TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]97

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, APPELLANTS,

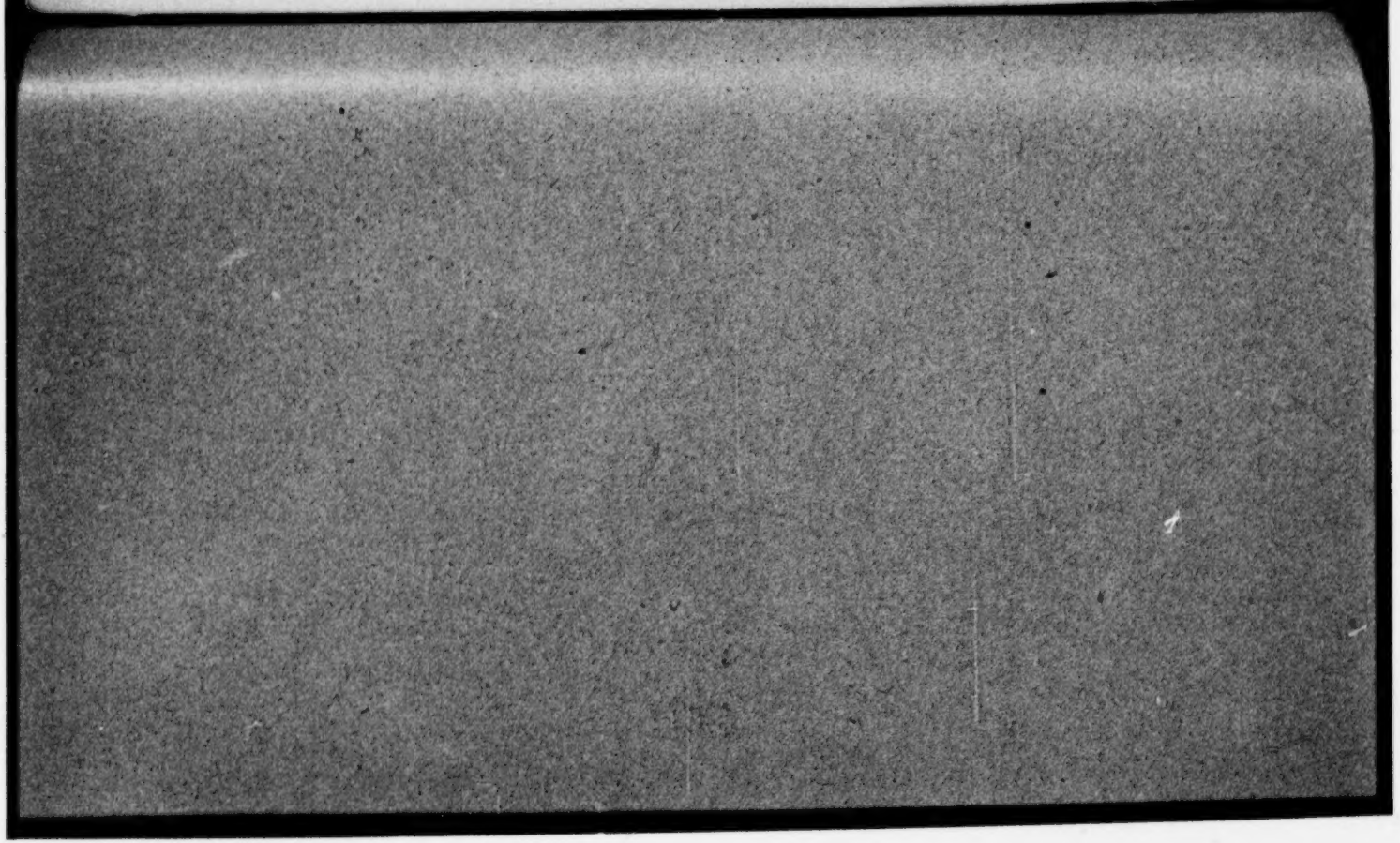
vs.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED [illegible]

(22862)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 430.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, APPELLANTS,

VS.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a United States Commerce Court.

No. 1.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA & SANTA FE Railway Company, petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION, RESPONDENT,

THE UNITED STATES, THE PACIFIC COAST JOBBERS & MANUFACTURERS' Association, and the Associated Jobbers of Los Angeles, intervening respondents.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that on the first day of June, 1910, came the petitioners in the above-entitled cause, by their solicitors, and filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, their certain bill of complaint and exhibits in the words and figures following, to wit:

Bill of complaint and exhibits.

1 In the Circuit Court of the United States, within and for the District of Kansas, first division.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka and Santa Fe Railway Company, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, DEFENDANT.	In equity. No. 8886.

Bill of complaint.

F. C. DILLARD,
ROBERT DUNLAP,
T. J. NORTON,
C. W. DURBROW,
P. F. DUNNE,
Solicitors for Complainants.
W. F. HERRIN,
GARDINER LATHROP,
Of counsel.

2 In the Circuit Court of the United States, within and for the District of Kansas, first division.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka and Santa Fe Railway Company, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, DEFENDANT.	In equity.

To the honorable judges of the Circuit Court of the United States within and for the District of Kansas:

The Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, and The Atchison, Topeka and

Santa Fe Railway Company, a corporation organized under the laws of the State of Kansas, bring this their bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of Congress of the United States. And thereupon your orators complain and say:

That The Atchison, Topeka and Santa Fe Railway Company is and for a number of years last past has been a corporation duly organized and existing under the laws of the State of Kansas, and has and has had its principal operating office in the city of Topeka, in the district of Kansas; that it is now and for a number of years last past has been operating lines of railroad from points in the States of Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, Texas,
3 and the Territories of New Mexico and Arizona, to and into the city of San Francisco in the State of California, and with lines extending to other points in said State, and is and has been engaged in the transportation of freight and passengers between various points on its said lines of railroad.

That the Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and is now and for a number of years last past has been engaged in operating a line of railroad in connection with other railroads extending from El Paso, Texas, through the Territories of New Mexico and Arizona, and through the State of California by way of the city of Los Angeles to San Francisco, California; and also a line of railroad between San Francisco, California, and Salt Lake City, Utah, and is and has been engaged in the transportation of persons and property upon and over its said lines of railroad; that such lines extending from El Paso, Texas, via Los Angeles to San Francisco were formerly owned and operated for a number of years by the Southern Pacific Railroad Company, its predecessor in interest, and the line extending from San Francisco to Salt Lake City was originally owned and operated by the Central Pacific Railroad Company.

That at all times each of said complainants and their respective predecessors in interest have maintained and do now maintain their respective public freight depot buildings theretofore established by each of them in said city of San Francisco upon or adjacent to their respective tracks connecting with their respective main tracks in said city where freight in less than carload lots is and has been received for transportation from shippers in said city destined to various points upon their respective lines of railroad or points upon
4 connecting lines of railroad in the United States, and where such freight transported from various points to San Francisco is delivered to the owners or consignees thereof.

That each of said complainants and their respective predecessors in interest have also located and established and have maintained and do now maintain what are known as "team tracks" and freight sheds, connected with their respective main tracks in said city of San Francisco, where cars are set for the accommodation of the public in general for the loading therein of carload freight by respective ship-

pers in said city destined for transportation to various points upon their respective lines or to points on connecting lines of railroad in the United States; and where also is set and placed for the unloading thereof by consignees or owners in said city, who have not been favored with the private or special sidetrack facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad, or points on other lines of railroad in the United States or elsewhere, to such owners or consignees in said city of San Francisco; and said teaming tracks and freight sheds of said respective companies are so connected with the respective main-line tracks of the respective complainant in said city that cars loaded with carload freight may be readily transferred from said main-line tracks to said teaming tracks and sheds and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said teaming tracks and freight sheds constitute and have constituted the places where the respective complainants receive and have
5 heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of San Francisco, and the same are and have been adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds, and buildings, above shown, constitute the places established as depots or stations by each of the complainants, respectively, in said city of San Francisco for the receipt, handling, and delivery of carload and less-than-carload freight, intrastate and interstate. Said facilities so established and maintained for the receipt, handling, and delivery of less-than-carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or at any day can be tendered. The freight sheds and team tracks established and maintained for receipt, handling, and delivery of carload freight are sufficient to handle all the carload freight coming into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of carloads of freight coming into or going out of San Francisco, whether originating on or destined to said team tracks or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds, without inconvenience to them, more than double the amount of all of said carload freight can be received, handled, and delivered. In addition to this, each of complainants has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will, as the requirements of the public may demand, place other sheds and team tracks; so that there is no necessity in the proper conduct of
6 complainants' business or in the rendering of proper service to shippers in said city to have or maintain the industrial

tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping, and receiving freight and to save them the expense of cartage which they otherwise would have to pay and which is paid by the public, not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth; and in the investigation had by the Interstate Commerce Commission, hereinafter referred to, the undisputed evidence fully established the facts herein alleged.

Your orators further aver that each of them, as well as their respective predecessors in interest, have heretofore severally or individually entered into contracts or agreements with certain individual shippers in San Francisco or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city for the construction of spur tracks from the respective plant or industry in said city to and connecting with the yard tracks of the respective complainant in said city where trains of cars of freight are made up or distributed, a part of the cost of such spur track being generally borne by the railway company and a part by such shipper. But such tracks were constructed especially to accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective complainant carload freight consigned to or shipped by the owner or operator of said plant and therefrom, and thus the owner or operator of such plant or industry located upon such spur or sidetrack was relieved from
7 the necessity of transferring carload freight to and from said team tracks and from and to such plant or industry by dray or cart or wagon at a higher cost and greater risk; and in being accorded such sidetrack facility the shipper at such industry or plant was given or accorded a decided advantage over other shippers in San Francisco who were not favored with such spur tracks; that in such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years (usually less than five) a spur track to connect such plant or industry with the railroad of the railway company. But in such contracts it was generally provided that while the railway company might make use of the proposed track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such plant or industry, but that traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

Your orators further aver that in the contracts made by the Southern Pacific Company covering the construction and maintenance of such industrial or spur tracks it was generally provided, among other things, as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands and connections to be furnished by and at the cost of Southern

Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

8 "3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year said Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

That contracts made for such purposes by The Atchison, Topeka and Santa Fe Railway Company contained, among other things, the following provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track the railway company shall have the right to remove said track and every part thereof."

That the contracts made by the San Pedro, Los Angeles & Salt Lake Railroad Company covering the construction and maintenance of such spur or industrial tracks contained provisions somewhat similar to those of the Southern Pacific Company above set forth.

9 Your orators further aver that industries or plants in said city of San Francisco located upon spur tracks heretofore constructed under contract as aforesaid by The Atchison, Topeka and Sante Fe Railway Company, in said city of San Francisco, are distant from its main track or breaking-up yards in said city anywhere from one-fourth of a mile to 3.4 miles, and that in order to receive a carload of freight from such plant or industry it will be, as it has been, necessary to switch from the main track or yards of the respective complainant an empty car and set the same at such industry where the same can be conveniently loaded by the shipper,

and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; that where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said respective complainant over said spur to the industry or plant in question and to place the same convenient thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of complainant.

Your orators further aver that industries or plants in said city of San Francisco located upon spur tracks heretofore constructed under contract as aforesaid by the Southern Pacific Company, or its predecessor in interest, in said city of San Francisco are distant from its main track or making-up yards in said city anywhere from 200 feet to 6 miles, and that in order to receive a carload of freight from such plant or industry it will be, as it has been, necessary to switch from the main track or yards of the respective complainant an
10 empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; that where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said complainant over said spur to the industry or plant in question and to place the same convenient thereat for unloading, and, in many instances, the empty car is required to be switched or transferred in being returned from such plant to the general yards of complainant.

Your orators further aver that in such contracts governing the construction and maintenance of such industrial tracks no specific sum was fixed or prescribed in case the railway company should perform the aforesaid special service of receiving or delivering freight at the plant or industry in question, but at the time of executing such contract the usual charge separately and specially set forth in the respective tariffs of respective complainants, for making such special deliveries, or such special receipt of carload freight involving the switching service to and from such plant or industry from and to the yards of respective complainant where trains are made or broken up, had been generally established by each of your orators at the sum or price of $2.50 per car, and had for many years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed
11 such special service a charge therefor in addition to the freight rate from and to San Francisco would be made and such charge of $2.50 has generally been made, maintained, and collected from said shippers in San Francisco for said special service as aforesaid.

And your orators further aver that at the investigation or hearing before the Interstate Commerce Commission hereinafter referred to the above facts were fully established by the undisputed evidence.

Your orators further aver that the aforesaid service heretofore rendered by the respective railway companies of receiving carload freight at said industries or delivering the same to such industries or plants instead of at the team tracks or sheds is of great value to the owners or operators of such industries or plants and is worth much more than the sum of $2.50 per car, inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have thus been favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into.

Your orators further aver that at the hearing before the Interstate Commerce Commission hereinafter more particularly mentioned it was admitted of record by the shippers that the said charge of $2.50 is reasonable for the service performed; and it appeared during said hearing that the general or prevailing charge for drayage in
12 San Francisco is 50 cents a ton, which makes the cost to the consignee $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed by these complainants for delivering the consignment to or receiving the shipment at the door of the consignee's or shipper's warehouse; in addition to which money saving the shipment escapes the frequent handling necessitated by cartage and the exposure to storm and theft.

Your orators further aver that in performing said special switching service involved in the receipt and delivery of carload freight at such industry or plant it is put to a much greater expense than if such freight were received or delivered on its teaming tracks or at its freight sheds.

Your orators further aver that each of them has made and established its rates of transportation to and from said city of San Francisco from and to such points on their respective lines, and in many instances joint rates from and to points on many other railroads in the United States; that they have duly published and filed with the Interstate Commerce Commission and posted in their respective stations where freight is received their respective schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less-than-carload freight and for carload freight; and that in respect to less-than-carload freight the rates have been established and made to cover the receipt or delivery of such

freight at the freight station of the respective railway company in said city, and in respect to carload freight the rates established for the public in general contemplate receipt or delivery thereof upon or at the team tracks or sheds of the respective railway
13 company; that in said tariffs it has been and is distinctly and separately provided and stated that where carload freight is received at or delivered to private industries located upon such industry tracks in said city of San Francisco, an additional charge, i. e., a charge in addition to the rate fixed to and from San Francisco, amounting to $2.50 per car, will be charged and collected for said special service of making special delivery or receipt of carload freight to or at said plants or industries located in said city of San Francisco upon such special industry tracks.

Your orators further aver that on account of water and other competition the rates of transportation to and from San Francisco have been forced to an exceedingly low basis so that complainants do not receive for such transportation sums which they are justly entitled to and which they would otherwise be able to charge and collect; and, therefore, your orators ought not to be required or forced to perform the aforesaid special service of receiving or delivering goods at or to certain private industries in said city without reasonable reward and compensation for such special service.

On the contrary your orators aver that they are not legally obliged to receive or deliver carload freight at any other place in said city than upon their team tracks or at their freight sheds where carload freight is delivered to or received from the public in general, and that, therefore, when they voluntarily undertake for said favored shippers to receive or deliver carload freight at points on other tracks or at other points in said city they have the lawful right to make an additional and separate charge for the rendition of such special service at least equal to or commensurate with the value of such service.
14 Yet your orators state that notwithstanding the premises certain of said shippers so favored as aforesaid under such special arrangements by which they have been heretofore enabled to deliver their freight or receive the same at the doors of their respective plants or industries, conspired, combined, and confederated together to complain of said charge of $2.50 as being unauthorized and illegal under the interstate commerce law, and to repudiate the conditions and the special rate for the special service and favors heretofore granted to them, and filed on or about the 27th day of August, 1908, a complaint in the name of the Pacific Coast Jobbers & Manufacturers Association before the Interstate Commerce Commission and against your orators, a true copy of which complaint is hereto attached marked "Exhibit A" and made a part hereof.

In due time your orators respectively answered said complaint before said commission. A copy of the answer made by the Atchison, Topeka and Santa Fe Railway Company is hereto attached marked "Exhibit B" and made a part hereof.

A copy of the answer of the Southern Pacific Company is hereto attached, marked "Exhibit C" and made a part hereof.

Thereafter said Interstate Commerce Commission proceeded to hear said complaint and took testimony in respect thereto. Thereafter on or about April 11, 1910, said commission filed their report in respect to said complaint wherein and by which report it appeared that a majority of the said commission, following a ruling made by them in a case heard at the same time of the complaint of the
15 Associated Jobbers of Los Angeles before said commission against the Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and the San Pedro, Los Angeles and Salt Lake Railroad Company, held and decided that it was unlawful and illegal for complainants or either of them to make or establish or set forth in their respective tariffs, in addition to the scheduled rates to and from San Francisco, a separate charge for the aforesaid special service of receiving or delivering carload freight at the respective plants or industries located upon the aforesaid industrial tracks in said city of San Francisco.

A true copy of the report of said commission made upon the complain of said Pacific Coast Jobbers & Manufacturers Association is as follows, to wit:

"LANE, *Commissioner:*

"This case presents precisely the same questions as are raised in Associated Jobbers of Los Angeles v. A., T. & S. F. Ry Co., 18 I. C. C. Rep., 310. Both cases were heard together, and the facts in each are similar. We find the imposition of the charge for receipt from or delivery upon a spur track when incident to a system-line haul to be unlawful and unjust under the facts and circumstances presented in this case, and an order will be entered accordingly.

"Knapp, chairman, dissents for reasons stated in Associated Jobbers of Los Angeles v. A., T. & S. F. Ry. Co., supra."

For the information of the court your orators attach hereto a copy of the report and opinion of the respective Interstate Commerce Commissioners made in the said case of Associated Jobbers of Los Angeles v. The Atchison, Topeka and Santa Fe Railway Company et al., and referred to above, marked "Exhibit D."

16 Thereupon in pursuance of the aforesaid decision said commission made their order upon said complaint, ordering and directing your orators, defendants therein, to cease and desist on or before the first day of July, 1910, and for a period of not less than two years thereafter to abstain from exacting their present charge of $2.50 per car for delivering or receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits in the said city of San Francisco, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul; and for the same period to cease and desist from exacting any charge whatever other than the charge for transportation from points of origin to destination for delivering or receiving carload freight to or from industries located upon

spurs or side tracks within their respective switching limits in the city of San Francisco, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul.

The aforesaid order so made and entered by the said commission is as follows, to wit:

"No. 1649.

"*Pacific Coast Jobbers and Manufacturers' Association*

v.

"*Southern Pacific Company and the Atchison, Topeka and Sante Fe Railway Company.*

"This case being at issue on complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed
17 a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at San Francisco, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce.

"It is ordered that said defendants be, and they are hereby, notified and required to cease and desist on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of San Francisco, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered that said defendants be, and they are hereby, notified and required to cease and desist on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of San Francisco, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul."

A certified copy of the aforesaid report and order of the said commission was duly mailed by the secretary thereof to each of your orators and duly received by them on or about the 12th day of May, 1910.

18 But your orators aver that the aforesaid order of said commission is unauthorized and erroneous and was made under

a misconception of the law; that said order is unjust and unreasonable and deprives your orators of reasonable and just compensation for the rendition of services which they are not obliged under the law to perform; that the aforesaid order is based upon a misconception of the facts, and that an enforcement of the same will give to the owners of industries located upon said industrial tracks a greater and more decided advantage over other shippers in San Francisco than is even now possessed by them, and will subject such other shippers to a greater disadvantage than they have been heretofore laboring under; also that said order deprives your orators of just, or indeed any, compensation for the said special services so rendered by them respectively, involving as it does the use of respective complainant's equipment and property, and deprives your orators of their property without due process of law, and is violative of the fifth amendment to the Constitution of the United States as well as being beyond the power and authority of said Interstate Commerce Commission.

Your orators further aver that if said order of said defendant, the Interstate Commerce Commission, should become effective and go into effect and be enforced, it would compel your orators to perform the aforesaid special service of switching cars to and from said special industries or plants in San Francisco without reasonable or, indeed, any compensation therefor; that the number of cars so switched is quite large during each year; and if said order of said defendant, the Interstate Commerce Commission, is allowed to remain and to become and be effective and enforced, the same will entail upon
19 your orators a loss of more than $200,000 per year, which loss will be absolute and complete to your orators.

Your orators further aver that if said order of said defendant, the Interstate Commerce Commission, is allowed to become and be effective, very many suits for penalties will be brought against each one of your orators by many persons interested in said order and its enforcement and claiming to be injured by the acts of your orators unless said order is obeyed, which said suits will be brought and prosecuted as aforesaid by very many persons in many of the judicial districts of the United States against each of your orators, whereby your orators and each of them will be subjected to a great multiplicity of suits, and great loss and damage will be inflicted upon your orators and each of them, all of which acts and doings will greatly injure and embarrass your orators and each of them in the transaction of their business.

Your orators further aver that notwithstanding the facts aforesaid, the said defendants, the Interstate Commerce Commission, maintains and intends to maintain, and will, unless the same is enjoined or suspended by the order of this honorable court, maintain, the said order as an effective order and institute, or suffer to be instituted, the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators.

Your orators therefore pray that upon the filing of this bill a temporary or interlocutory order be entered herein suspending the said order of the said Interstate Commerce Commission and re-
20 straining the enforcement of the said order of the said commission and restraining the said commission from taking any steps or instituting any proceedings to enforce the said order, and that upon a final hearing of this cause a decree be entered herein setting aside and annulling the said order of the said Interstate Commerce Commission and perpetually enjoining the enforcement of the said order and perpetually enjoining the said defendant and its members, their agents, servants, and representatives from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement of the said order.

Your orators further pray that, if any delay intervenes between the filing of this bill and the issuance of a temporary or interlocutory order, as prayed for herein, an order be issued herein suspending the said order of the said Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

And your orators further pray that such other and further relief be granted in the premises as justice and equity may require.

Your orators further pray that your honors grant unto your orators a writ of subpœna of the United States of America, directed to the said Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then and there full, true, and complete answer make to all and singular the premises, but not under oath (an answer under
21 oath being hereby expressly waived), and to stand to and abide such order and decree herein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray, etc.

SOUTHERN PACIFIC COMPANY,
By J. C. STUBBS,
Its Vice President and Director of Traffic.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
By F. B. HOUGHTON,
Its Freight Traffic Manager.

F. C. DILLARD,
ROBERT DUNLAP,
T. J. NORTON,
C. W. DURBROW,
P. F. DUNNE,
Solicitors for Complainants.

W. F. HERRIN,
GARDINER LATHROP,
Of Counsel.

22 STATE OF ILLINOIS,
County of Cook, ss:

J. C. Stubbs, being first duly sworn according to law, deposes and says that he is the vice president and director of traffic of the Southern Pacific Company, one of the complainants in the above entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the statements therein are true.

J. C. STUBBS.

Subscribed and sworn to before me this 27th day of May, A. D. 1910.

[SEAL.] JOHN A. MCDONALD,
Notary Public.

My commission expires Nov. 15, 1913.

23 STATE OF ILLINOIS,
County of Cook, ss:

F. B. Houghton, being first duly sworn according to law, deposes and says that he is the freight traffic manager of the Atchison, Topeka and Santa Fe Railway Company, one of the complainants in the above entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the statements therein are true.

B. F. HOUGHTON,

Subscribed and sworn to before me this 27th day of May, A. D. 1910.

[SEAL.] JOHN A. MCDONALD,
Notary Public.

My commission expires Nov. 15, 1913.

24 EXHIBIT A.

Before the Interstate Commerce Commission.

PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, complainant,
vs.
SOUTHERN PACIFIC COMPANY AND ATCHISON, TOPEKA and Santa Fe Railway Company, defendants.
} Complaint.

In re switching charges at San Francisco, California.

The petition of the above named complainant respectively shows:

First.

I.

That complainant is a voluntary association of individuals, firms, and corporations organized for the promotion and defense of jobbing and manufacturing interests on the Pacific coast. Said association

comprises in its membership a large number of representative persons, firms, and corporations who are engaged in wholesale business or in manufacturing, or in both wholesale business and manufacturing, who have their principal business locations in the city and county of San Francisco, State of California, and who are engaged and interested in the transportation of merchandise and commodities
25 from points east and north of California to San Francisco, and, also, from San Francisco to points east and north of California. Its principal office is at the Monadnock Building, city and county of San Francisco, State of California.

II.

That the defendant above named, Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Kentucky.

That the defendant, Atchison, Topeka and Santa Fe Railway Company is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Kansas.

III.

That each of the said defendants, during all the times in this bill of complaint referred to was, and still is, a public-service corporation and a common carrier engaged in the transportation of passengers and property both by railroad and partly by railroad and partly by water under a common control, management, and arrangement for continuous carriage and shipment from points in the United States east and north of the State of California to points in the State of California, and also from points in the State of California to points in the United States east and north of the State of California, and as such common carrier each of said defendants is subject to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and all acts amendatory thereof or supplementary thereto.

26 IV.

That for the purpose of receiving and delivering interstate freight carried over their lines between points east and north of the State of California and said city of San Francisco, said defendants have established in said city and county of San Francisco terminal freight yards. Said terminal freight yards are extensive in area and comprise within their limits large tracts of land owned or held under lease by said defendants, respectively, and rights of way for laying tracks and the operating of locomotives and the transportation of freight cars and trains over public streets in said city and county of San Francisco, granted to said defendants, respectively, by the public authorities of said city and county of San Francisco. At the instance

and request of defendants, respectively, many San Francisco merchants and manufacturers, members of the association complainant, and other San Francisco merchants and manufacturers in whose behalf, also, this petition is presented, have procured business locations immediately adjoining said terminal freight yards of said defendants and have erected upon said locations large warehouses and places of business; and said defendants, respectively, under contract and arrangement with said merchants and manufacturers have constructed short spur tracks, or industry tracks, leading from said warehouses and places of business to and connecting with the tracks of said defendants, respectively, running in and about said terminal freight yards. That the title of said industry tracks when constructed and of any privilege, grant, or franchise from the city and county of San Francisco required in order to authorize their construc-
27 tion is entirely in said defendants, respectively, and said merchants and manufacturers have no title whatever therein, nor right to use or operate the same. And said industry tracks when constructed, under and pursuant to the agreement required by said defendants, respectively, from such merchants and manufacturers, become and constitute part of the trackage of said defendants, respectively, and part of the receiving and delivering system of said defendants, respectively, for all interstate freight received at or carried from the said city of San Francisco. Said industry tracks do not as a general rule exceed in length two hundred yards. And in all cases as aforesaid, said industry tracks to all intents and purposes belong to and are owned and controlled by said defendants, respectively.

That the construction, operation, and maintenance of said industry tracks is of great value and assistance to said defendants because, otherwise said companies, and each of them, would be unable to transact the business of the receipt and delivery of interstate freight at San Francisco, or would be greatly hampered or hindered therein, to the resultant injury of the defendants and of the San Francisco public at large; since if said industry tracks at San Francisco were entirely discontinued and removed, said companies defendant would be compelled to very largely extend the limits of their terminal facilities and freight yards in order to transact the said business of receiving and delivering interstate freight at San Francisco.

That defendants maintain and publish tariffs known as Transcontinental Freight Bureau West-Bound Tariff No. 1-G I. C. C. No. 375
28 and supplement thereto applying on interstate freight originating at Colorado common points, Missouri River common points, and points east thereof and destined to Pacific coast terminals and transcontinental Freight Bureau East Bound Tariff No. 3-E I. C. C. No. 318 and supplements thereto applying on interstate freight originating at Pacific coast terminals and destined to Colorado common points, Missouri River common points, and points east thereof; and also numerous other tariffs applying on interstate freight to and from said Pacific coast terminals, and said city of San Francisco is one of said Pacific coast terminals.

That it is the duty of defendants as common carriers to receive and deliver interstate freight at their terminals at point of origin and at point of destination without further or other charge beyond the freight rate applying between such points, duly published according to law; but notwithstanding said duty said defendants, and each of them, unjustly and unreasonably and contrary to law, enforce, charge, and collect and retain to their own use, without division with connecting carriers a separate and extra charge for the receipt and delivery of interstate carload freight received or delivered upon said industry tracks at San Francisco in the sum of $2.50 per car on both incoming and outgoing cars. The charges complained of are found, respectively, as follows:

Southern Pacific Company's Terminal Tariff No. 230 B I. C. C. No. 2971, Item 65, applying at San Francisco, California, between depot and "industry tracks and private sidings within switching limits, as defined in item 101 on page 14 of this tariff, including team tracks at 16th and Harrison Streets and Potrero cut" on "freight not otherwise specified, carloads, when incidental to the line haul, $2.50 per car."

29 And in Santa Fe System Tariff No. 8117-A I. C. C. No. 4281, Item No. 42, applying at San Francisco, California, "between freight yards and industry warehouse or private side-tracks, freight carloads, when incident to the system line haul, $2.50 per car." Reference herein is hereby specially made to said above-named tariffs, and the same are hereby made a part of this complaint.

That immediately in the neighborhood of said industry tracks are located so-called team tracks, upon which free deliveries and receipts of interstate carload freight are made and taken by said defendants without any switching charge whatever.

That in cities of the United States similar in size and condition to San Francisco, such as Ogden, Salt Lake, El Paso, Denver, Omaha, Kansas City, St. Paul, Minneapolis, Chicago, St. Louis, Cleveland, Pittsburgh, and others, it is the usage and custom of common carriers of interstate freight to receive and deliver carloads of interstate freight upon such adjoining industry tracks free of any switching or extra charge and for one freight charge from point of origin to point of destination.

That these defendants have for many years past made no extra or any charge for receipt and delivery of carloads of interstate freight upon industry tracks at Stockton, Richmond, Oakland, or Sacramento, California. Said last-named points are "Pacific coast terminals," as defined in Transcontinental Freight Bureau West Bound Tariff No. 1-G I. C. C. No. 375 and Transcontinental Freight Bureau East Bound Tariff No. 3-E I. C. C. No. 318, and take the same rates as San Francisco on east and west bound interstate shipments; that at many other points in the State of California free deliveries and receipts of interstate freight are made and taken by said defendants upon industry tracks and side tracks.

30 And said defendant, the Southern Pacific Company, has not made for many years last past and does not now make at Portland or East Portland, in the State of Oregon, any extra or any charge for such industry receipts and deliveries.

The trans-continental railroad companies serving the cities of Seattle and Tacoma, in the State of Washington, make no charge for such receipts and deliveries of cars to and from industry tracks.

That said merchants and manufacturers of San Francisco are large importers and exporters of interstate freight. That ninety per cent of the commodities used and consumed at San Francisco, or distributed therefrom to points within the State of California, or to points beyond the boundaries of said State, is brought to San Francisco from Colorado common points, Missouri River common points, and points east thereof; and the greater part of these commodities is brought to San Francisco by these carriers, defendants herein.

That the imposition and collection by the said defendants, respectively, of said additional and extra charges for the receipt and delivery of such interstate freight on said industry tracks at San Francisco is unlawful, unreasonable, and unjust, in violation of said act to regulate commerce and of section one thereof.

Second.

I.

Complainant further says that said charges are also unreasonable and unjust in this: That they are too high when considered in connection with the cost of the service performed. And in this

31 behalf complainant states that the defendants make deliveries of interstate carload freight and receive the same upon certain team tracks of said defendants, respectively, free of any switching charge, and that such free deliveries and receipts are made and taken within short distances from the points where said industry track deliveries and receipts are made and taken. And complainant states, on information and belief, that the cost of such service on said industry tracks does not exceed the cost of service on said team tracks where no charge is made.

No extra or any charge is made for such service, as heretofore alleged, at Stockton, Richmond, Oakland, or Sacramento, California, or at many other points in California or at Portland, Oregon, or at Seattle or Tacoma, Washington, and it is customary for carriers to make no such charge in the cities of the United States similar in size and condition to San Francisco.

That, furthermore, when any charges are or have been made therefor by said defendants such charges at many California points have ranged and do range much lower than $2.50 per car, in some cases not exceeding $1.00 per car.

In many instances in the past, even at San Francisco, free industry track receipts and deliveries have been in force, and in other instances a charge as low as $1.25 per car has been made.

Third.

I.

That complainant further says that there are many persons, firms, and corporations located at Portland and East Portland, in
32 the State of Oregon, who are engaged in businesses which are competitive with the businesses maintained and carried on by said merchants and manufacturers, members of the association complainant. That said competitive individuals, firms, and corporations at Portland and East Portland, Oregon, have industry tracks connecting their warehouses and manufacturies with the tracks of the defendant, Southern Pacific Company, or with the tracks of the Northern Pacific Terminal Co. That said defendants carry interstate freight originating at points east of California to said Portland and East Portland, Oregon. That said Portland and East Portland are Pacific coast terminals and enjoy the same freight rates on such freight as said city of San Francisco. That said freight when carried by the defendant, Atchison, Topeka and Santa Fe Railway Company, is delivered at said Portland and East Portland by the said Southern Pacific Company under a joint arrangement for a continuous carriage or shipment. That deliveries and receipts of carload freight by said Southern Pacific Company and the switching to and from industry tracks at said Portland is chiefly performed by and over the tracks of a terminal company, to wit, the said Northern Pacific Terminal Company; and the carload rates named in the various tariffs of the said Southern Pacific Company apply to and from the industry tracks of the said Northern Pacific Terminal Company without extra or other charge for receipt or deliveries on said industry tracks. And said defendant, Southern Pacific Company, makes and collects no charge for delivery or receipt of such freight upon any industry tracks at said Portland or East Portland; and said competitive individuals, firms, and corporations at said Portland and East Portland, Oregon, are charged by said defendant, South-
33 ern Pacific Company, and pay no charge whatever for such receipt or delivery. And accordingly the imposition and collection of said $2.50 per car upon such interstate freight delivered or received upon said industry tracks at San Francisco as aforesaid constitutes an unjust discrimination against said San Francisco and said merchants and manufacturers, members of the association complainant, and an undue and unreasonable preference and advantage in favor of said Portland and East Portland and of said competitive individuals, firms, and corporations located at said Portland and East Portland, and subjects said San Francisco and said merchants and manufacturers, members of the association complainant, to an undue and unreasonable prejudice and disadvantage and an unjust discrimination in violation of said act to regulate commerce and of sections two and three thereof.

II.

That the cities of Oakland, Stockton, Sacramento, and Richmond are in the State of California and are Pacific coast terminals and take the same freight rates as the city of San Francisco on interstate west-bound freight originating at Colorado common points, Missouri River common points, and points east thereof. That in each and all of said cities are located individuals, firms, and corporations who are competitors of said San Francisco merchants and manufacturers in the distribution and sale of such west-bound freight, and said San Francisco merchants and manufacturers also meet at said points with competition from individuals, firms, and corporations located at Colorado common points, Missouri
34 River common points, and points east thereof as defined by said tariff No. 1–G I. C. C. No. 375 and supplements thereto. That in all of said cities industry tracks similar to those existing in San Francisco are maintained. That all of said cities are served by the tracks of the defendant—Southern Pacific Company—and Oakland, Stockton, and Richmond are also served by the tracks of the defendant—Atchison, Topeka and Santa Fe Railway Company. That no charge for receipts or deliveries of carload interstate freight upon said industry tracks in any of said cities is made or collected by either of said defendants and said competitors of said complainant and their customers who are located upon such industry tracks pay no charge for industry track service at any of said cities. That deliveries and receipts of carload freight by said defendants at said Richmond and the switching to and from industry tracks at that point is chiefly performed over the tracks of a terminal company, to wit: The Richmond Belt Railway; and the carload rates named in the various tariffs of the said defendants apply to and from the industry tracks of the said Richmond Belt Railway without extra or other charge for receipts or deliveries on said industry tracks, and the switching charge of the Richmond Belt Railway is absorbed from the freight charge of the line receiving the haul. Furthermore, said California cities take the same rates of freight as San Francisco on east bound interstate freight carried by said defendants, or either of them, but merchants and manufacturers in San Francisco are charged and must pay to said defendants $2.50 per car for interstate carload freight delivered to railroad company on said industry tracks and destined to points east and north of California, while their said competi-
35 tors in said cities are charged and pay no other charge than the freight rate on said east or north bound carload freight delivered to the carrier upon said industry tracks in any of said cities, and accordingly the imposition and collection of said $2.50 per car upon such freight delivered or received upon said industry tracks at San Francisco constitutes an unjust discrimination against said city of San Francisco and said merchants and manufacturers, members of the association complainant, and an undue and unreasonable pref-

erence and advantage in favor of said Oakland, Stockton, Sacramento, and Richmond, and of said competitive individuals, firms, and corporations and subjects said city of San Francisco and said merchants and manufacturers therein located to an undue and unreasonable prejudice and disadvantage and an unjust discrimination in violation of said act to regulate commerce and sections two and three thereof.

III.

That the city of San Jose, in California, is one of said Pacific coast terminals, and takes the same rates as San Francisco on east bound interstate freight moving under rates named in Transcontinental Freight Bureau East Bound Tariff No. 3–E I. C. C. No. 318, and supplements thereto. That said freight when carried by the defendant—Atchison, Topeka & Santa Fe Railway Company—is delivered to said company by said defendant—Southern Pacific Company—under a joint arrangement for continuous carriage or shipment.

That there are located in San Jose merchants and manufacturers who have industry tracks connected with the lines of the
36 Southern Pacific Company, defendant, and who are competitors with said San Francisco merchants and manufacturers in the distribution and sale of freight moving east bound under rates named in said tariff No. 3–E.

That said Southern Pacific Company provides in its said terminal tariff No. 230–B I. C. C. No. 2971, item 73 thereof, that switching charges at San Jose between depot and industry tracks and private sidings, within switching limits, etc., will be waived on shipments moving east bound under rates named in said Transcontinental Freight Bureau East Bound Tariff No. 3–E I. C. C. No. 318, supplements thereto or superseding issues thereof. And accordingly the imposition and collection of said $2.50 per car upon such freight received by said defendants upon said industry tracks at San Francisco constitutes an unjust discrimination against said city of San Francisco and said merchants and manufacturers therein located, and an undue and unreasonable preference and advantage in favor of said city of San Jose and of said competing merchants and manufacturers of San Jose and subjects said city of San Francisco and said merchants and manufacturers therein located to an undue and unreasonable prejudice and disadvantage and an unjust discrimination in violation of said act to regulate commerce and of sections two and three thereof.

Fourth.

Furthermore, if it shall be contended or held that said industry track charge is part of the interstate freight rate and is not a terminal, extra, separate, or additional charge, then complainant states that said cities of San Francisco, Oakland, Stockton, Rich-
37 mond, Sacramento, and San Jose are by said defendants desig-

nated "Pacific coast terminals" in said transcontinental tariffs, both east and west bound, and take the same rates under said tariffs upon said interstate freight deliverable or receivable upon industry tracks, with this exception, that no charge for such receipt or delivery is made at any of said cities, as aforesaid, except at the said city of San Francisco. And accordingly said transcontinental rates applying at San Francisco are unjust and unreasonable by the measure that said charge of $2.50 per car charged and collected, as aforesaid, at San Francisco, and not charged or collected at said other Pacific coast terminals, and constitute a violation of section one of said act to regulate commerce.

And complainant further charges that said interstate rates applying to and from San Francisco (if said industry track charge is to be considered as part of said rates) constitute an unjust discrimination against said city of San Francisco and said merchants and manufacturers named in the complaint and an undue and unreasonable preference and advantage in favor of said other Pacific coast terminals and of said competitive individuals, firms, and corporations and subjects said city of San Francisco and said manufacturers and merchants therein located to an undue and unreasonable prejudice and to an unjust discrimination in violation of said act to regulate commerce and of sections two and three thereof.

Wherefore complainant prays that the defendants, and each of them, may be required to answer the charges herein and that, after due hearing and investigation, an order be made commanding the defendants, and each of them, to cease and desist from said violations of "An act to regulate commerce," approved February 4,
38 1887, and acts amendatory thereof and supplementary thereto, and for every violation of said act involved in this proceeding; to cease and desist from making the charges and collecting the unjust and unreasonable charges complained of in the complaint and the excessive and discriminatory charges herein complained of and from the enforcement of said unlawful and unreasonable tariffs; and if it shall be held that the defendants, or either of them, have the right to make any charge whatsoever for the delivery or receipt of interstate freight upon said industry tracks at San Francisco, then, in that case, that this honorable commission make an order fixing, establishing, and substituting in lieu and in place of said excessive, unjust, unreasonable, and discriminatory rates and charges, reasonable rates for such industry track service at said San Francisco, and that said charges, if any whatever be authorized to be made, be found and adjudged not to be greater in any case than twenty-five cents per car and that the defendants, and each of them, be duly ordered and required to conform to and obey such orders; and complainant further prays for such other and further orders and relief in the premises as to this honorable commission may seem necessary or proper in the premises.

Dated at San Francisco, California, this 3 day of July, 1908.

PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION,
By A. C. RULOFSON, *President.*
SETH MANN,
Attorney for Complainant,
250 Montgomery Street, San Francisco, Cal.

39 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

A. C. Rulofson, being duly sworn, says that he is the president of the Pacific Coast Jobbers and Manufacturers Association, complainant in this proceeding, and that he makes this verification of the foregoing complaint for and on behalf of said association; that he has read the foregoing complaint and knows the contents thereof, and that the matters set forth in the foregoing complaint are true, as he verily believes.

A. C. RULOFSON.

Subscribed and sworn to before me this 3d day of July, 1908.
[SEAL.] SID S. PALMER,
Notary Public in and for the City and County of San Francisco, State of California.

40 EXHIBIT B.

Before the Interstate Commerce Commission.

PACIFIC COAST JOBBERS AND MANUFACTURERS Association, complainant,
vs.
THE SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka and Santa Fe Railway Company, defendants.
} Docket No. 1649.

Separate answer of the Atchison, Topeka and Santa Fe Railway Company.

Now comes the Atchison, Topeka and Santa Fe Railway Company, and for its separate answer and defense to the complaint in the above entitled proceeding respectfully shows:

I.

It has no knowledge of the matters and things contained in paragraph one of said complaint and therefore denies the same.

II.

It admits it is a Kansas corporation.

III.

It admits it is a common carrier over its own line of railroad.

IV.

(a) Answering the 4th paragraph of said complaint, this de-
41 fendant denies that said industry tracks, or any of them, ever became or constituted part of the trackage of this defendant or part of the receiving or delivering system of this defendant; that, on the contrary, said tracks were constructed and are maintained for the use of the industries located thereon, respectively; and said tracks may be used by this defendant only so far as such use does not interfere with the full use of said tracks in handling the business of the industries located thereon.

This defendant denies that said industry tracks, or any of them, are of great or any value to this defendant in the conduct of its business or otherwise, but, on the contrary, alleges that they are an item of expense to it and a source of constant risk and frequent loss to this defendant. And this defendant denies that without said tracks its business would be in anywise hampered, but affirms that without them this defendant's business would be greatly facilitated and more economically conducted. And this defendant denies that without such tracks it would be compelled greatly to increase its terminal facilities, but avers that the discontinuance of serving on said industry tracks would necessitate only a slight increase in team tracks, averring that one mile of team track will serve to handle as much freight as is handled, on the average, on ten miles of industry track.

This defendant admits its duty is to deliver freight at point of destination, but avers that it is always ready and willing and able to deliver on its own team tracks at point of destination, without extra charge, and that any shipper desiring such delivery is given it without any charge for switching; that the charge for switching, which is the cause of complaint herein, is never made except
42 for a service separate and distinct from the ordinary delivery of goods by a rail carrier at its own depot or team track and is never made except at the special instance and request of the shipper. And this defendant denies that it is its duty to deliver freight without separate charge for delivery elsewhere than at its depot or on its team tracks designated for that purpose.

This defendant admits that some industry tracks are near free-delivery tracks, but shows that others are at considerable distance therefrom, and that to reach delivery points on industry tracks it is frequently, and generally necessitates, pulling cars across or along city streets, all at no little risk and loss to defendant and at great expense because of delays and of necessarily slow movement.

This defendant has no information or belief sufficient to enable it to answer the allegations in said paragraph to the effect that ninety

per cent. of the commodities used at San Francisco or distributed therefrom is brought from Colorado common points, Missouri River common points, and points east thereof, and therefore denies said allegations.

And this defendant denies that the imposition and collection by it of said additional and extra charges, is unlawful, unreasonable, or unjust, or in violation of any law.

(b) And as a further defense this defendant shows that it and its predecessors have been carrying freight in and out of San Francisco only since about the year 1896; that long before this defendant or its predecessors entered said city and, as this defendant is informed and believes, for upwards of forty years, the charges herein complained of had been regularly made and paid by shippers at San Fran-
43 cisco. That every one of said industry tracks connecting with the rails of this defendant was constructed at the request, and in many cases at the expense, of the owner of the plant to be served by such track, and in every case with the full knowledge and understanding on the part of such owner that the charge herein complained of would be made for all cars handled by this defendant over such industry tracks for the plant served thereby.

(c) This defendant further shows that its rates to and from San Francisco, especially the rates to and from points east of the Missouri River, are rates forced upon this defendant by reason of water competition existing at San Francisco and are very much less than this defendant might reasonably charge for the service rendered; that the rate, together with the switching charge herein complained of, amount to much less than this defendant might reasonably charge for the service rendered. That whatever this defendant obtains for the carriage of freight in and out of San Francisco, especially to and from points east of the Missouri River, is what it can charge and secure for business as against water competition and is much less than it might reasonably charge for the service rendered.

V.

Answering the second cause or ground of complaint as set forth in said complaint, this defendant denies that the charges complained of are too high, whether considered in connection with the cost of the services performed or otherwise; and this defendant denies that the cost of such service on said industry tracks does not exceed the
44 cost of service on team tracks, where no charge is made, but shows, on the contrary, that the cost of service of the industry tracks is very greatly in excess of the cost of service on team tracks.

VI.

(a) Answering the third cause or ground of complaint, and particularly the first paragraph thereof, this defendant admits that free delivery is made at Portland and East Portland practically as in said

paragraph set forth, but denies that such delivery results in any discrimination against San Francisco or the shippers thereof; and denies that such charges constitute or result in an undue or unreasonable preference or advantage in favor of said Portland and East Portland, or subjects said San Francisco or its shippers to any undue or unreasonable prejudice or disadvantage. And on its information and belief this defendant shows that its co-defendant is compelled by competitive conditions of long standing at Portland and East Portland to perform at those points free services similar to those charged for at San Francisco, the charge for which constitute the cause of complaint herein.

(b) Answering the second paragraph of said third ground of complaint this defendant denies that the imposition of said switching charge at San Francisco constitutes any unjust discrimination against said city or its shippers, or any undue or unreasonable preference or advantage in favor of said Oakland, Stockton, and Richmond, or the shippers thereof, or subjects the city of San Francisco or its shippers to any unreasonable or undue prejudice or disadvantage, or unjust discrimination, in violation of any law.

45

VII.

And as a further defense this defendant shows that it and its predecessors have been carrying freight in and out of San Francisco only since about the year 1896; that long before this defendant or its predecessors entered said city, and, as this defendant is informed and believes, for upwards of forty years, the charges herein complained of had been regularly made and paid by shippers at San Francisco. That every one of said industry tracks con'ecting with the rails of this defendant was constructed at the request, and in many cases at the expense, of the owner of the plant to be served by such track, and in every case with the full knowledge and understanding on the part of such owner that the charge herein complained of would be made for all cars handled by this defendant over such industry tracks for the plant served thereby.

VIII.

This defendant further shows that its rates to and from San Francisco, especially the rates to and from points east of the Missouri River, are forced upon this defendant by reason of water competition existing at San Francisco, and are very much less than this defendant might reasonably charge for the services rendered; that the rate, together with the switching charge herein complained of, amount to much less than this defendant might reasonably charge for the services rendered. That whatever this defendant obtains for the carriage of freight in and out of San Francisco, especially to and from points east of the Missouri River, is what it can charge and

46 secure for business as against water competition, and is much less than it might reasonably charge for the services rendered.

This defendant denies that the said charges assessed and collected by it as aforesaid are unjust or unreasonable, or that they constitute an unjust discrimination against the city of San Francisco, or said merchants or manufacturers, or constitute an undue or unreasonable preference or advantage in favor of other Pacific coast terminals, or subject said city of San Francisco or said manufacturers or merchants therein located to any undue or unreasonable prejudice or any unjust discrimination in violation of sections 2 or 3 of the act to regulate commerce or any other section of said act.

This defendant denies any and all violation of the act to regulate commerce or acts amendatory thereof or supplemental thereto.

Wherefore this defendant prays that said complaint may be dismissed as to it.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

By ——— ———
——— ———
——— ———

Its Attorneys.

47 EXHIBIT C.

Before the Interstate Commerce Commission.

PACIFIC COAST JOBBERS AND MANUFACTURERS' Association, complainant,
vs.
SOUTHERN PACIFIC COMPANY AND ATCHISON, Topeka & Santa Fe Railway Company, defendants.
} Docket No. 1649.

Southern Pacific Company, for answer herein, respectfully shows:

I.

For want of sufficient information it is unable to admit or deny specifically the matters contained in the first paragraph of the petition herein, and therefore leaves the complainant to its proofs in that behalf.

II.

The allegations of paragraph II of the petition are admitted.

III.

So far as paragraph III is concerned, this defendant says that it is a common carrier engaged in interstate traffic, passenger and freight, south of Portland to San Francisco, and west of Ogden, Mojave, and Rio Grande to San Francisco, and is subject to the

provisions of the act of Congress to regulate commerce; and further than this makes no admission in respect to paragraph III.

48 IV.

As to paragraph IV, this defendant, for the purposes generally indicated in paragraph IV, has established terminal freight yards in San Francisco of extensive area and comprising large tracts of land, owned or leased by this defendant, and rights of way for trackage and operation and transportation over public streets in San Francisco, granted by the public authorities, and many San Francisco merchants and manufacturers have procured business locations adjoining these terminal freight yards and have erected thereon warehouses and places of business—not in all cases at the instance and request of defendant, nor is it accurate to say that it was exclusively at the instance and request of defendant, but it was also upon the judgment and in the best interest of the several merchants and manufacturers.

It is the fact that the defendant, under arrangements with the merchants and manufacturers, has constructed short spur tracks, or industry tracks, leading from warehouses and places of business to the tracks of defendant in and about the terminal freight yards. The title to the constructed industry tracks, and to any privilege, grant, or franchise from the municipal authorities authorizing the construction, is in the defendant where the track is on its right of way and, subject to some qualifications, is in the defendant when the track extends beyond and over the private realty of the merchant or manufacturer concerned. These industry tracks, when thus constructed, are part of the trackage of the defendant, and are a part of the receiving and delivering system of the defendant for interstate freight received at or carried from the city of San Fran-
49 cisco, in the sense that they are physical extensions and parts of physical extensions, from the main line; but they are not part of the trackage of this defendant in the sense that they are part of the receiving or delivering system of this defendant, and, in fact, they are constructed and maintained for the use and in the interest of the industries located thereon, and are open to use by defendant only so far as that use does not conflict with the full use of the trackage in the specific purpose of handling business thereon for the special and private benefit of the industries thereon located. These industry tracks do not, as a general rule, exceed in length 187 yards.

The construction, operation, and maintenance of these industry tracks is not of great or special value to this defendant in the conduct of its business, and have been a source of expense and risk thereto, and is of considerable value and assistance to the manufacturer or merchant served thereby. It is not true that without these industry tracks defendant would be unable to transact the business of the receipt and delivery of interstate freight at San Francisco, nor is it true that in the absence of such tracks defendant would be ham-

pered or hindered therein, or, for that matter, hampered or hindered at all, in view of the availability of team tracks for purposes of receipt and delivery; nor is it true that the absence of such industry tracks would be to the resultant injury of defendant and of the San Francisco public at large for the reasons assigned in the petition; for, while it is said therein that the defendant would be compelled to extend very largely the limits of its terminal facilities and freight yards, in order to transact the business of receiving and delivering interstate freight at San Francisco, it is not true that such
50 facilities and yards would have to be increased greatly or to any large extent, and it is the fact that deliveries can and could be made from team tracks to the persons now enjoying the benefits and advantages of these industry tracks.

It is true that this defendant maintains and publishes Transcontinental Freight Bureau West-bound Tariff No. 1–G, I. C. C. No. 373, and supplements thereto, applying on interstate freight originating at Colorado common points, Missouri River common points, and points east thereof, and destined to Pacific coast terminals; also Transcontinental Freight Bureau East-bound Tariff No. 3–E, I. C. C. No. 318, and supplements thereto, applying on interstate freight originating at Pacific coast terminals and destined to Colorado common points, Missouri River common points, and points east thereof; and also tariffs applying on interstate freight to and from Pacific coast terminals.

V.

It is true that it is the duty of defendants as common carriers to receive and deliver interstate freight at their terminals at point of origin and at point of destination without further or other charge beyond the freight rate applying between such points, duly published according to law; and, further, it is the duty of defendant as a common carrier so to receive and deliver interstate freight without discrimination. It is not true, however, that this defendant unjustly or unreasonably or contrary to law enforces, charges, collects, or retains to its own use, or without division with connecting carriers, a separate and extra charge for the receipt and delivery of interstate car-
51 load freight received or delivered upon these industry tracks in the sum of $2.50 per car, or any other sum, on either incoming or outgoing cars. The switching services enjoyed by complainants, and which they are asking to have made free to them, are for a service separate and distinct from the ordinary delivery of goods by a rail carrier at its depot or team tracks, and it is not the duty of this defendant to render that particular and special service without separate charge therefor. It is the fact that charges were made, as per this company's terminal tariff No. 230 B, I. C. C. No. 2971, item 65, applying at San Francisco, California, between depot and points therein mentioned, but the subject matter is now covered by tariff No. 230 C, I. C. C. No. 3011, and supplements 1 and 2 thereof.

It is true that in the neighborhood of the industry tracks, and conveniently accessible to the complainant, and complainants herein, are located team tracks upon which free deliveries and receipts of interstate carload freight are made and taken by defendant without switching charge, such free deliveries and receipts being open to those complainants without discrimination. It is also true that other industry tracks are at a greater distance from team tracks and that a longer and more expensive haul is necessary thereon, including necessity of hauling cars across and over city streets at considerable expense and loss of time.

In reference to other cities in the United States, the same being mentioned in the petition, it is denied that the conditions there are similar to those obtaining in San Francisco, and, further, the information of this defendant does not justify it in admitting the averment that the usage and custom of common carriers of interstate freight at such places is to receive and deliver carloads upon
52 industry tracks free of switching or extra charge and for one freight charge from point of origin to point of destination; and in that behalf defendant puts the complainant on its proof.

It is not true that this defendant has for any time made no extra or any charge for receipt and delivery of carloads of interstate freight upon the industry tracks at Stockton, Richmond, Oakland, or Sacramento, California, except to the extent following:

In respect to Oakland: On shipments between transfer track of the Atchison, Topeka & Santa Fe Railway Company, or the San Francisco, Oakland & San Jose Railway Company, and industry tracks and private sidings located at Alameda, Alameda Point, Berkeley, East Oakland, Pacsteel, United Engineering Works, West Alameda, West Berkeley, and intermediate points on business on which this defendant receives no line haul, a charge of $2.50 for switching is made; on shipments switched from Oakland Station to or from the points last mentioned, on which this company gets a line haul, a switching charge of $2.50 per car is made; and on shipments between industry tracks and private sidings within the switching limits, which include the territory from West Berkeley, and include Fruitvale to and including Part Street, Alameda, to and including West Oakland and the transfer track of the San Francisco, Oakland & San Jose Railway Company, or the Atchison, Topeka & Santa Fe Railway Company, on shipments originating at or destined to noncompetitive points on the said Atchison line, a rate of $2.50 per car is charged by defendant. Where defendant receives a line haul, no charge is made on business switched to points located as follows: From 16th
53 Street on the Port Costa line, by way of Oakland Wharf and West Oakland, to the west end of the trestle, west of Alice Street on the Niles line and to the signpost east of drawbridge on the Alameda line. Conditions in respect to this switching movement, for which no charge is made, are substantially dissimilar as compared with the conditions at San Francisco.

In respect to Stockton: Between depot and industry tracks and private sidings within yard limits, where defendant receives line haul, switching is free. Between industry tracks and private sidings and transfer track of said Atchison Railway Company, freight, when originating at or destinated to competitive points on said Atchison Company, is switched free; and between the same points, when destined to noncompetitive points on said Atchison Company, a switching charge of $2.50 per car is made. Between industry tracks and private sidings and transfer tracks of the Western Pacific Railway Company, on shipments originating at or destined to noncompetitive points on the Western Pacific Railway Company, a switching charge of $2.50 per car is made. The conditions at Stockton, in respect to free switching, are substantially dissimilar as compared with those at San Francisco.

In respect to Sacramento: Between depot, industry tracks and private sidings on B Street, between 7th and 16th Streets, where defendant receives a line haul, a switching charge of $1.50 per car is made, and a similar charge is made where defendant receives line haul, between depot and industry tracks on Front Street, between Q and R Streets. Between the depot and industry tracks and private sidings west of 7th Street and north of Q Street, where this company receives line haul, freight is switched free; and the switching
54 is free between Placerville branch yards, and I Street: and brick is switched free, where defendant receives line haul, between depot and transportation company's landing. Conditions at Sacramento, in reference to free switching, are substantially dissimilar from those at San Francisco.

In respect to Richmond: No switching charge is assessed at that point where this defendant has a line haul, but in cases where shipments are moved between points within the yards at Richmond, or where shipments are moved on the Richmond Belt Railway, switching charges are assessed.

In respect to Portland and East Portland, Seattle and Tacoma: The conditions are substantially dissimilar as compared with the case of San Francisco. And further, it is not true that defendant has not made and does not make, at Portland or East Portland, any charge for industry receipts and deliveries in the sense that there is no switching charge at those places, for the fact is, so far as Portland is concerned, that switching is performed by a terminal company, called the Northern Pacific Terminal Company, in which the Southern Pacific Company, with other transportation companies at Portland, is interested, and which charges $5.00 per car of 20 tons or less, with 25 cents for each additional ton; and on business originating at or destined to points on the Oregon Railroad & Navigation Company, where that company and Southern Pacific Company's lines in Oregon receive a line haul, the switching charge is absorbed by the Oregon Railroad & Navigation Company, the rates applying to industry and private tracks within the yard limits. At East Portland, where the switching is done by the Oregon Railroad & Naviga-

55 tion Company, no charge is made on business on which that company or the Southern Pacific Company's lines in Oregon receive a line haul; while on business received from or delivered to connecting lines, on which neither the Oregon Railroad & Navigation Company nor the Southern Pacific Company's lines in Oregon receive a line haul, there is a charge of $5.00 per car.

It is not true that at many other points, or at other points in the State of California, free deliveries and receipts of interstate freight are made and taken by defendant upon industry tracks and side tracks, where the conditions at any place are substantially similar to those obtaining at San Francisco.

With respect to the allegation that 90 per cent. of the commodities used and consumed at San Francisco and distributed therefrom to points within the State of California, or to points beyond the boundaries of said State, are brought to San Francisco from Colorado common points, Missouri River common points and points east thereof, defendant's information does not enable it to answer the said allegation, and, for that reason, it leaves the complainant to its proofs thereof.

It is not true that the imposition or collection by this defendant of additional or extra charges for the receipt or delivery of interstate freight on the industry tracks at San Francisco is unlawful or unreasonable or unjust, or in violation of the act to regulate commerce or of section 1 thereof. And further, the switching charges at San Francisco are of long standing and application at that particular place. The industry tracks were constructed at the request and, at least to an extent, at the expense of the merchant or manufacturer served thereby, and in all cases with the full knowledge and under-

56 standing upon his part that the switching charge now complained of would be made. The San Francisco terminal rates are, as is well known, compelled rates, forced upon defendant by water competition at San Francisco and are considerably below what would be a reasonable charge for the service rendered; and said terminal rate, together with the switching charge now complained of, amount to considerable less than complainants might reasonably be required to pay for the service.

VI.

It is not true that these switching charges are unreasonable or unjust in the respect indicated in the second principal division of the petition; nor are said charges too high when considered in connection with the cost of the service performed. It is true that this defendant makes deliveries of interstate carload freight and receives the same upon team tracks, free of switching charge, but it is not true that such free deliveries and receipts are made and taken within relatively short distances from the points where the industry track deliveries and receipts are made and taken; nor is it true that the cost of service on the industry tracks does not exceed the cost of service on the team tracks.

The reference in the second division of the petition to certain specified cities has been already covered in this answer.

It is not true that it is customary for carriers to make no switching charge in cities of the United States where the conditions are substantially similar to those at San Francisco; nor is it true that charges at many California points for switching by defendant have
57 ranged or do range much lower than $2.50 per car, or that in any case, similar to the case in San Francisco, such charges do not exceed $1.00 per car. Nor is it true that in many instances in the past, at San Francisco, free industry track receipts and deliveries have been in force, or that in other instances a charge as low as $1.25 has been made where the circumstances and conditions were substantially similar to those under which the present charges are imposed.

In respect to the third principal division of the petition, defendant says that its denials and averments herein, in reference to Portland and East Portland, cover the references to those places in said third division; and further, this defendant denies that the imposition or collection of $2.50 per car upon interstate freight, delivered or received upon industry tracks at San Francisco, constitutes unjust or any discrimination against San Francisco or said merchants or manufacturers, members of complainant association, or an undue or unreasonable or any preference or advantage in favor of Portland or East Portland or any competitive individual, firm, or corporation located thereat, or subjects San Francisco or any of said merchants or manufacturers to any undue or unreasonable or any prejudice or disadvantage or any unjust or any discrimination, in violation of the act to regulate commerce, or of section 2 or section 3 thereof. And further, the special competitive and dissimilar conditions at Portland and East Portland differentiate the switching condition thereat from the switching condition in San Francisco, and this statement will apply generally to the whole complaint of complainant in so far as reference is made to those places.

58 The information of defendant does not enable it to admit or deny, and it therefore puts complainant to its proof, touching the allegation that in Oakland, Stockton, Sacramento, and Richmond, or any or either of them, there are located individuals, firms, or corporations who are competitors of San Francisco merchants or manufacturers in the distribution or sale of west-bound freight; or that the San Francisco merchants or manufacturers meet, at the points alleged, with competition from individuals, firms, or corporations located at Colorado common points, Missouri River common points, or points east thereof, as defined by said tariff No. 1-G, I. C. C. No. 375, and supplements thereto. The situation at these named places, in respect to switching, has already been covered by defendant in this answer. At Richmond the switching is, as alleged, chiefly performed over the tracks of the terminal company, namely, the Richmond Belt Railway. The carload rates in defendant's tariffs apply to and from the industry tracks of said belt railway. It is not

true that the switching charge of the Richmond Belt Railway is absorbed from the freight charge of the line receiving the haul.

It is not true that the imposition or collection of said $2.50 per car upon freight delivered or received upon the industry tracks at San Francisco constitutes an unjust or any discrimination against San Francisco or the said merchants or manufacturers, or an undue or unreasonable or any preference or advantage in favor of said named places or of any competitive individuals, firms, or corporations, or subject San Francisco or said merchants or manufacturers therein located to an undue or unreasonable or any prejudice or disadvantage or to an unjust or any discrimination in violation of the act to regulate commerce or section 2 or section 3 thereof.

59 The information of this defendant does not enable it to admit or deny the allegation that merchants or manufacturers are located in San Jose who are competitors with San Francisco merchants or manufacturers in the distribution or sale of east-bound freight under rates named in tariff No. 3-E. The conditions at San Jose in respect to the waiver of switching charges on east-bound shipments are substantially dissimilar to those obtaining at San Francisco; and it is not true that the imposition or collection of $2.50 per car upon such freight received by defendant upon industry tracks at San Francisco constitutes an unjust or any discrimination against San Francisco or any of said merchants or manufacturers therein located, or an undue or unreasonable or any preference or advantage in favor of San Jose or of any competing merchants or manufacturers thereof, or subjects San Francisco or any merchants or manufacturers therein located to an undue or unreasonable or any prejudice or disadvantage or to an unjust or any discrimination in violation of the act to regulate commerce or of section 2 or section 3 thereof.

In respect to the fourth principal division of the complaint: The question of the charge for receipt or delivery at San Francisco, as compared with the condition in that behalf at the other cities in said fourth division named, is covered by what has already been said in this answer; and any averments in this answer, addressed to any former movement of the petition. are intended to apply to any other division of the complaint to which they are appurtenant.

It is not true that the transcontinental rates applying at San Francisco are unjust or unreasonable by the measure of said charge of $2.50 per car, or otherwise or at all, or constitutes a viola-

60 tion of section 1 of the act to regulate commerce, or an unjust or any discrimination against San Francisco or any merchants or manufacturers named in the complaint, or an undue or unreasonable or any preference or advantage in favor of Pacific coast terminals, or of any competitive individual, firm, or corporation, or subjects San Francisco or any manufacturers or merchants therein located to an undue or unreasonable or any prejudice, or to an unjust or any discrimination in violation of the act to regulate commerce, or of section 2 or section 3 thereof.

Wherefore this defendant prays that complainant take nothing by its complaint herein and that the same be dismissed.

SOUTHERN PACIFIC COMPANY,
By H. A. JONES,
Freight Traffic Manager.
P. F. DUNNE and
C. W. DURBROW,
Attorneys for Defendant.
WM. F. HERRIN,
Of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

H. A. Jones, being duly sworn, deposes and says: That he is an officer, to wit, the freight traffic manager of the Southern Pacific Company, one of the defendants in the above-entitled proceeding, that he has read the foregoing and knows the contents thereof, and that the same is true as he verily believes.

H. A. JONES.

Subscribed and sworn to before me this 21st day of September, 1908.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

61 EXHIBIT D.

No. 1649.

PACIFIC COAST JOBBERS' & MANUFACTURERS' ASSOCIATION
v.
SOUTHERN PACIFIC COMPANY ET AL.

Submitted December 2, 1909. Decided April 11, 1910.

Charge of $2.50 per car exacted for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within carriers' switching limits found unlawful when such carload freight is moving incidentally to a system-line haul; charge found not unlawful when such carload freight is moving incidentally to a foreign-line haul. Associated Jobbers of Los Angeles *v.* A., T. & S. F. Ry. Co., ante, p. 310, followed.

Seth Mann for complainants.

P. F. Dunne and C. W. Durbrow for the Southern Pacific Company.

T. J. Norton, E. W. Camp, and H. D. Pillsbury for Atchison, Topeka & Santa Fe Railway Company.

62 *Report of the commission.*

LANE, *Commissioner:*

This case presents precisely the same questions as are raised in Associated Jobbers of Los Angeles *v.* A., T. & S. F. Ry. Co., 18 I. C. C.

Rep., 310. Both cases were heard together and the facts in each are similar. We find the imposition of the charge for receipt from or delivery upon a spur track when incident to a system-line haul to be unlawful and unjust under the facts and circumstances presented in this case, and an order will be entered accordingly.

Knapp, chairman, dissents for reasons stated in Associated Jobbers of Los Angeles *v.* A., T. & S. F. Ry. Co., supra.

18 I. C. C. Rep.

63 And on the same day, to wit, the first day of June, 1910, a certain chancery subpœna issued out of the clerk's office of the United States Circuit Court for the District of Kansas, First Division, addressed to the Interstate Commerce Commission, which said subpœna and the marshal's return of service thereof are in the words and figures following, to wit:

Chancery subpœna.

64 UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America.

To the Interstate Commerce Commission, greeting:

We command you, and every of you, that you appear before our judge of our Circuit Court of the United States of America for the District of Kansas, First Division, at the city of Topeka, in said district, on the first Monday in the month of July next, to answer the bill of complaint of Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company this day filed in the clerk's office of said court in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the District of Columbia to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this 1st of June, in the year of our Lord one thousand nine hundred and ten.

[The seal of the Circuit Court of the United States, District of Kansas.]

G. F. SHARITT, *Clerk.*

Memorandum.—The above-named defendant is notified that unless it enter its appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable the complaint will be taken against it as confessed and a decree entered accordingly.

G. F. SHARITT, *Clerk.*

65 Endorsed:

No. 8886.

Circuit Court United States, District of Kansas.

SOUTHERN PACIFIC COMPANY ET AL.

vs.

THE INTERSTATE COMMERCE COMMISSION.

Chancery subpœna.

Returnable to rule day, first Monday in July, A. D. 1910.

G. F. SHARITT, *Clerk.*

Filed Sept. 26, A. D. 1910.

G. F. SHARITT, *Clerk.*
F. C. DILLARD,
ROBERT DUNLAP,
T. J. NORTON,
C. W. DURBROW,
Compt's Sols.

U. S. marshal's return.

DISTRICT OF COLUMBIA, *ss:*

Received the within writ June the 4, 1910, and executed the same as follows, to wit: Served on the within-named Interstate Commerce Commission by service on Edward A. Moseley, secretary, June 4, 1910.

AULICK PALMER,
U. S. Marshal.

66 And afterwards, to wit, on the 7th day of June, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, a certain certificate of the Attorney General of the United States in the words and figures following, to wit:

Expediting certificate.

67 In the Circuit Court of the United States for the District of Kansas, First Division.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka and Santa Fe Railway Company, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. ——.

To the Clerk of the court:

I hereby certify that the above-entitled cause now pending in said court is a suit in equity brought by the Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company against the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," as amended by the act of June 29, 1906, and that said suit is, in my opinion, a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled:

"An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted,"

approved February 11, 1903; and in further compliance with the provisions contained in section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file this certificate among the records of the above-entitled cause, and immediately furnish a copy thereof to each of the circuit judges of the eighth circuit to the end that said case shall be given precedence over other cases in said
68 court and be assigned for hearing at the earliest practicable date before not less than three of the circuit judges of said circuit, as is provided by the said act of February 11, 1903.

WM. S. KENYON,
Acting Attorney General.

WASHINGTON, D. C., *June —, 1910.*

69 And afterwards, to wit, on the 10th day of June, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, in said cause, a certain order of the Interstate Commerce Commission, in the words and figures following, to wit:

Order of Interstate Commerce Commission.

70 At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of June, A. D. 1910.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
} Commissioners.

No. 1649.

PACIFIC COAST JOBBERS' & MANUFACTURERS' ASSOCIATION

v.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Upon further consideration of the record in the above-entitled case, *It is ordered*, That the order heretofore entered in said case, and by its terms made effective on July 1, 1910, be, and it is hereby, so

modified as to become effective on November 1, 1910, instead of on said July 1, 1910.

It is further ordered, That a copy of this order be served upon each of the parties to this case.

A true copy.

[Seal of Interstate Commerce Commission.]

E. A. MOSELEY,
Secretary.

71 And afterwards, to wit, on the 11th day of June, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, in said entitled cause, a certain appearance, in the words and figures following, to wit:

Appearance of P. J. Farrell.

72 In the Circuit Court of the United States within and for the District of Kansas, First Division.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka and Santa Fe Railway Company, complainants,
vs.
THE INTERSTATE COMMERCE COMMISSION, defendant.
} In Equity. No. ———.

To the clerk of said court:

Please enter my appearance as solicitor for the Interstate Commerce Commission, the defendant in the above-entitled cause.

P. J. FARRELL,
Solicitor for the Interstate Commission.

73 And on the same day, to wit, the 11th day of June, 1910, came the defendant, the Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, its certain answer, in the words and figures following, to wit:

74 In the Circuit Court of the United States, within and for the District of Kansas, First Division.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka and Santa Fe Railway Company, complainants,
v.
THE INTERSTATE COMMERCE COMMISSION, defendant.
} In equity. No. ——.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, the defendant in the above-entitled cause, now and at all times hereafter saving and reserving

to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering paragraphs 1 to 3, inclusive, of the bill:

Defendant admits that the allegations contained in said paragraphs are true.

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II.

Answering paragraph 4 of the bill:

Defendant admits that the allegations contained in said paragraph are true, except that defendant denies that the team tracks and team-track facilities mentioned in said paragraph have been in the past or are now sufficient or adequate to fully accommodate the traffic transported in carloads in and out of the city of San Francisco by the complainants.

III.

Answering paragraph 5 of the bill:

Defendant admits that the main tracks, team tracks, sheds, and buildings mentioned in said paragraph 4 of the bill constitute places established as depots or stations by the complainants, respectively, in said city of San Francisco for the receipt, handling, and delivery of carload and less than carload freight, intrastate and interstate; disclaims information sufficient to form a belief as to whether or not said facilities are sufficient for the handling of double the amount of the freight which has been or is tendered to complainants upon said team tracks, at said sheds and said buildings, but denies that said facilities are sufficient for the handling of double the amount of freight which can be on any day so tendered; denies that the freight sheds and team tracks established and maintained by complainants at said San Francisco for the receipt, handling, and delivery of carload freight are sufficient for all the carload freight shipped

76 into and out of said San Francisco, including freight delivered on said team tracks and freight delivered on industrial tracks; disclaims information sufficient to form a belief as to whether or not each of the complainants in connection with its depots or stations has a considerable amount of vacant land upon which it can or will, as the requirements of the public may demand, place other sheds or team tracks; denies that there is no necessity in the proper conduct of complainants' business or in the rendering of proper services to shippers in said city to have or maintain the industrial tracks mentioned by complainants in their bill; disclaims information sufficient to form a belief as to whether or not said industrial tracks were con-

structed for the purposes enumerated by complainants in said paragraph 5, and denies that the undisputed evidence in the investigation had by defendant established the facts alleged by complainants in said paragraph 5.

IV.

Answering paragraph 6 of the bill:

Defendant admits that the allegations contained in said paragraph are substantially true. In this connection, however, defendant alleges that the *the* expense incurred in providing the sidetrack facilities mentioned in said paragraph was largely borne by the shippers whose industries are accommodated by such facilities, and that one of the principal reasons which prompted the complainants to assist in providing such facilities was a desire to obtain sidetracks and ter-
77 minal facilities in San Francisco which might be and are used by them in connection with the transportation of property other than that originating at or destined to said industries.

V.

Answering paragraphs 7, 8, 9, 10, and 11 of the bill:

Defendant admits that the allegations contained in said paragraphs are substantially true. In this connection, however, defendant alleges that the expense to complainants of transferring freight traffic from their main tracks to said industries or from said industries to their main tracks is no greater than the expense incurred by complainants in transferring freight traffic from said main tracks to complainants' team tracks or from said team tracks to said main tracks.

VI.

Answering paragraph 12 of the bill:

Defendant admits that the allegations contained in said paragraph are true, except that defendant denies that at the times special agreements pertaining to said sidetrack facilities were entered into by and between the complainants on the one hand and the shippers whose industries were and are accommodated by such facilities on the other hand the latter willingly consented that if the complainants performed the services of transferring freight traffic from their main tracks to said industries and from said industries to said main
78 tracks they might in each instance make a charge for such services in addition to the charge made by them for transporting such freight to and from San Francisco.

VII.

Answering paragraph 13 of the bill:

Defendant denies that at the hearing before it, referred to in said paragraph, the truth of the allegations contained in paragraph 12 of the bill was established by undisputed evidence, or established at all, except to the extent of the admissions made by defendant in its answer to said paragraph 12.

VIII.

Answering paragraphs 14 and 15 of the bill:

Defendant admits that the allegations contained in said paragraphs are substantially true. In this connection, however, defendant alleges that the charge of $2.50 mentioned in said paragraph is in each instance applied to services performed by complainants which are included in and covered by the rates exacted by complainants for transporting freight articles to and from San Francisco, and that therefore such charge of $2.50 is unreasonable and unjust to the full extent thereof.

IX.

Answering paragraph 16 of the bill:

Defendant denies that in performing the switching service involved in the receipt and delivery of carload freight at the
79 aforesaid industries complainants are put to a greater expense than would be necessary in performing the switching service involved in the receipt and delivery of carload freight on their team tracks or at their freight sheds.

X.

Answering paragraph 17 of the bill:

Defendant admits that complainants have made and established rates of transportation to and from San Francisco from and to points on their respective lines, and in many instances have made and established joint rates from and to points on many other railroads in the United States; admits that complainants have published and filed with defendant schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less-than-carload freight and for carload freight; disclaims information sufficient to form a belief as to whether or not complainants have duly posted said schedules or tariffs in their respective stations where freight is received by them; admits that in respect to less-than-carload freight said rates have been established and made to cover the receipt and delivery of such freight at the respective freight stations of complainants in San Francisco, but alleges that neither the receipt nor the delivery of such less-than-carload freight by complainants, under said schedules, is restricted to said freight stations; admits that, in respect to carload freight, rates established by complainants for the public in general
80 cover receipt and delivery upon and at the team tracks and sheds of the respective complainants, but alleges that, under said schedules, neither such receipt nor such delivery by complainants is restricted to said team tracks and sheds, although defendant admits that in said schedules it has been and is stated that where carload freight is received at or delivered to private industries

located upon industry tracks in San Francisco a charge of $2.50 per car, in addition to the rate to or from San Francisco, as the case may be, will be charged and collected in each instance by complainants.

XI.

Answering paragraph 18 of the bill:

Defendant denies that on account of water competition or other competition the rates of transportation to and from San Francisco have been forced to an exceedingly low basis; denies that complainants do not receive for such transportation rates as great as the rates they are justly entitled to; admits that complainants ought not to be required or forced to perform the service of receiving or delivering goods at said industries in San Francisco without reasonable reward and compensation for the services performed by them, but alleges that in each instance the rates exacted by complainants for transportation to and from San Francisco, exclusive of said $2.50 charge, furnish to complainants such reward and compensation.

81 Defendant disclaims information sufficient to form a belief as to whether or not water competition or other competition prevents complainants from charging and collecting as great rates for transportation to and from San Francisco as they would be able to charge and collect if such competition did not exist.

XII.

Answering paragraph 19 of the bill:

Defendant denies that complainants are not legally obliged to receive or deliver carload freight at any place in San Francisco other than upon their team tracks or at their freight sheds, and denies that when complainants undertake to receive or deliver carload freight on tracks other than their team tracks or at places other than their freight sheds they are entitled to make a charge therefor in addition to the charge exacted by them for the transportation of said freight to or from San Francisco, as the case may be.

XIII.

Answering paragraphs 20, 21, 22, 23, 24, 25, 26, 27, and 28 of the bill:

Defendant admits that the allegations contained in said paragraphs are true, except that defendant denies that the shippers referred to in said paragraph 20 entered into a conspiracy or did any other wrongful act in connection with the complaint mentioned in said paragraph 20.

82 XIV.

Answering paragraph 29 of the bill:

Defendant denies that the order of defendant referred to in paragraph 27 of the bill is unauthorized or erroneous; denies that said

order was made by defendant under a misconception of law; denies that said order is unjust or unreasonable; denies that said order deprives complainants of reasonable or just compensation for the rendition of services which they are not obliged under the law to perform; denies that said order is based upon a misconception of facts; denies that the enforcement of said order will deprive complainants of just compensation for services rendered by them, or deprive complainants of their property without due process of law, and denies that said order is violative of the fifth amendment of the Constitution of the United States, or beyond the power or authority of defendant.

XV.

Answering paragraph 30 of the bill:

Defendant denies that if said order should become effective it would compel complainants to perform the service of switching cars to or from industries in San Francisco without reasonable compensation; admits that the number of cars switched annually by complainants in San Francisco is large, but disclaims information sufficient to form a belief as to whether or not the enforcement of said order will reduce to the extent of $200,000 per year the revenue complainants would otherwise receive.

83

XVI.

Answering paragraph 31 of the bill:

Defendant believes that the statements contained in said paragraph are and that each of said statements is irrelevant and immaterial; therefore defendant neither admits nor denies that any of said statements is true. In this connection, however, defendant alleges that complainants may avoid the inconvenience and injury pictured in said paragraph by complying with the terms of said order.

XVII.

Answering paragraph 32 of the bill:

Defendant admits that unless said order is suspended or set aside by the court defendant will maintain same as an effective order and institute or suffer to be instituted for that purpose judicial proceedings, but defendant denies that such action on its part would be contrary to equity or good conscience or tend to the manifest wrong or injury of complainants.

Defendant denies every other matter, cause, or thing in the complainants' bill of complaint contained material or necessary for defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied.

All of which matters and things the said defendant is ready to aver, maintain, and prove as this honorable court shall direct, and

84 thereby prays to be hence dismissed with its reasonable costs and charges in that behalf sustained.

THE INTERSTATE COMMERCE COMMISSION,
[Seal of I. C. C.] By EDWARD A. MOSELEY,
Secretary thereof, thereunto duly authorized.
W. S. KENYON,
Assistant to the Attorney General, Washington, D. C.,
HARRY J. BONE,
United States Attorney, Topeka, Kans.,
P. J. FARRELL,
Special Assistant U. S. Attorney, Washington, D. C.,
Solicitors for Interstate Commerce Commission.

WASHINGTON, *District of Columbia, ss:*

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, having read the foregoing answer and knowing the contents thereof, hereby make oath that the matters of fact therein stated are true to the best of my knowledge, information, and belief.

EDWARD A. MOSELEY,
Secretary of the Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this 8th day of June, 1910.

H. S. MILSTEAD,
Notary Public.

[Notarial seal.]

85 And afterwards, to wit, on the 4th day of July, 1910, came the complainants in said entitled cause, by their solicitors, and filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, their certain replication to answer, in the words and figures following, to wit:

86 In the Circuit Court of the United States within and for the District of Kansas, First Division.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, DEFENDANT.	In Equity, No. 8886.

Replication to answer.

These repliants, Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and in-

sufficiencies of the answer of the Interstate Commerce Commission, for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these repliants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

F. C. DILLARD,
ROBERT DUNLAP,
T. J. NORTON,
C. W. DURBROW,
P. F. DUNNE.
Solicitors for Complainants.
W. F. HERRIN,
GARDINER LATHROP.
Of Counsel.

87 And afterwards, to wit, on the 29th day of October, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, in said entitled cause, a certain stipulation, in the words and figures following, to wit:

Stipulation to transfer cause to United States Commerce Court.

88 In the Circuit Court of the United States within and for the District of Kansas, First Division.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka and Santa Fe Railway Company, complainants, *vs.* INTERSTATE COMMERCE COMMISSION, defendants.	In Equity. No. 8886.

Stipulation.

It is hereby stipulated and agreed between the parties to the above cause that the same shall be removed or transferred under the act of June 18, 1910, to the Commerce Court of the United States as soon as said court shall be organized, and that in the meantime no evidence need be taken for the final hearing of the cause under the equity

rules by either party while said cause shall be pending in the United States Circuit Court, but that evidence for the final hearing may be taken after the removal of said cause to said Commerce Court and in accordance with the procedure and practice described by said court.

F. C. DILLARD,
ROBERT DUNLOP,
T. J. NORTON,
C. W. DURBROW,
P. F. DUNNE,
Solicitors for Complainants.

W. S. KENYON,
HARRY J. BONE,
P. J. FARRELL,
Solicitors for Defendant.

89 And afterwards, to wit, on the 20th day of December, 1910, there was filed and entered in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, in said entitled cause, a certain order, in the words and figures following, to wit:

Order.

90 In the Circuit Court of the United States within and for the District of Kansas, First Division.

SOUTHERN PACIFIC COMPANY, ET AL., complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. 8886.

Order transferring cause to the Commerce Court.

In pursuance of the stipulation filed in the above cause and of the provisions of the act approved June 18, 1910, it is hereby ordered that the above case be transferred to the Commerce Court of the United States, and that immediately upon the organization of said court the clerk of this court shall transmit to and file in the said Commerce Court the originals of all papers filed in the above cause and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

JOHN C. POLLOCK, *Judge.*

91 And afterwards, to wit, on the 24th day of February, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain petition of intervention, in the words and figures following, to wit:

Intervening petition of the Pacific Coast Jobbers & Manufacturers Association.

92 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON TOPEKA & SANTA FE RAILWAY COMPANY
vs.
THE INTERSTATE COMMERCE COMMISSION.
} In Equity. No. 1.

Petition of intervention.

To the Honorable Judges of the United States Commerce Court:

Your petitioner, the Pacific Coast Jobbers and Manufacturers' Association, a voluntary unincorporated association, by its solicitor, Seth Mann, respectfully represents that the above-entitled suit is based upon an order of the Interstate Commerce Commission dated April 11, 1910, made and entered in a proceeding then pending before the commission wherein your petitioner was the complainant; that your petitioner is interested in said suit and order, and that said order to which reference is hereby made is set forth on pages 15 and 16 of the bill in said suit.

Wherefore your petitioner prays that it may be made a party to said suit and be allowed to participate therein and be entitled to notice of all proceedings pertaining thereto in the same manner and to the same extent as though named as such party at the time said suit was instituted in court.

Dated San Francisco, California, March 6, 1911.

PACIFIC COAST JOBBERS & MANUFACTURERS' ASSOCIATION,
By SETH MANN,
Its Solicitor.

SETH MANN,
1203 Merchants' Exchange Bldg.,
San Francisco, California,
Counsel for Petitioner.

93 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Eugene Goodwin, being first duly sworn according to law, deposes and says that he is the secretary of Pacific Coast Jobbers and Manufacturers' Association, the petitioner in the foregoing petition for

intervention; that he knows the facts stated therein and that the statements therein are true.

EUGENE GOODWIN.

Subscribed and sworn to before me this 6th day of March, 1911.

[SEAL.] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed:

Service of copy of within petition of intervention admitted this 11 day of March, 1911.

E. W. CAMP, *for A. T. & S. F.*
C. W. DURBROW, *for S. P. Co.*
A. L. HALSTED, *for Salt Lake.*
P. J. FARRELL, *for I. C. C.*

94 And afterwards, to wit, on the 18th day of March, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

Motion of Interstate Commerce Commission.

95 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND ATCHISON, Topeka & Santa Fe Railway Company
v.
INTERSTATE COMMERCE COMMISSION.
} In Equity. No. 1.

Motion.

Comes now the Interstate Commerce Commission, the defendant in the above-entitled suit, by P. J. Farrell, its solicitor, and moves this honorable court to proceed to final determination of the issues involved in said suit without receiving testimony or other evidence, and in support of said motion shows: That every material allegation contained in the bill of complaint of the above-named complainants is admitted in the answer of this defendant to said bill.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Defendant.

96 And afterwards, to wit, on the 3d day of April, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain petition of intervention, in the words and figures following, to wit:

97 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON Topeka & Santa Fe Railway Company *vs.* THE INTERSTATE COMMERCE COMMISSION. } In Equity. No. 1.

Petition of intervention of the Associated Jobbers of Los Angeles.

To the honorable judges of the United States Commerce Court:

Your petitioner, the Associated Jobbers of Los Angeles, a voluntary unincorporated association, by its solicitor, Seth Mann, respectfully shows, as follows:

That said association is a voluntary association of individuals, firms, and corporations organized for the promotion and defense of the jobbing and manufacturing interests of the city of Los Angeles, State of California. That said association was the complainant before the Interstate Commerce Commission in a proceeding in which said commission made an order dated on or about April 11, 1910, which order is the basis of the suit pending in this court, entitled Atchison, Topeka & Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company *v.* the Interstate Commerce Commission, in equity No. 2, and your petitioner has filed in said suit its petition of intervention. That the above-entitled suit is based upon an order of the Interstate Commerce Commission, dated on or about the 11th day of April, 1910, which said order is to all intents and purposes the same as the order which forms the basis of the said suit, designated in this court as in equity No. 2, except that said order involved in the said suit pertains to the city of San Francisco, whereas the order involved in said suit numbered in equity No. 2 pertains to the city of Los Angeles. That the facts involved in both of said cases are similar

98 and the principles involved are the same, and your petitioner is accordingly interested in the above-entitled suit. That said order involved in the said above-entitled suit, to which reference is hereby specially made, is set forth on pages 15 and 16 of the bill in said suit.

Wherefore your petitioner prays that it may be made a party to said suit and be allowed to participate therein and be entitled to notice of all proceedings pertaining thereto in the same manner and

to the same extent as though named as such party at the time said suit was instituted in the court.

Dated at Washington, D. C., April 3, 1911.

ASSOCIATED JOBBERS OF LOS ANGELES,
By SETH MANN, *its Solicitor.*

SETH MANN,
1203 Merchants' Exchange Building, San Francisco, Cal.,
Counsel for Petitioner.

99 *Three.*

Seth Mann, being first duly sworn, says that he is the solicitor of the Associated Jobbers of Los Angeles, the petitioner in the foregoing petition for intervention; that he knows the facts stated in said petition, and the same are true.

SETH MANN.

WASHINGTON, *District of Columbia, ss:*

Subscribed and sworn to before me, G. F. Snyder, a notary public in and for said District of Columbia, this 3d day of April, 1911.

[Notarial seal.] G. F. SNYDER, *Notary Public.*

My commission expires February 14th, 1913.

Endorsed:

Service of copy of the within petition of intervention admitted this 3rd day of April, 1911.

ROBERT DUNLAP,
T. J. NORTON,
F. C. DILLARD,
A. L. HALSTED,
P. F. DUNNE,
H. A. SCANDRETT,
C. W. DURBROW,
Solicitors for Complainants.

P. J. FARRELL,
Solicitor for I. C. C.
J. A. FOWLER,
For the United States.

100 And on the same day, to wit, the 3d day of April, 1911, there were filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, two certain orders, in the words and figures following, to wit:

Orders granting leave to intervene.

101 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka & Santa Fe Ry. Co., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 1.

In this cause the United States moves the court that it be permitted to intervene and to become a party defendant; and it ap-

pearing to the court that the cause involves public interests, the motion is allowed, and the United States is made a party defendant accordingly, and it is granted thirty days within which to make defense, either by motion or answer, but defense shall be made in such time as not to delay a hearing of the cause.

102 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka & Santa Fe Railway Co., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 1.

ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 2.

On motion of counsel it is ordered in said causes: That the Pacific Coast Jobbers and Manufacturers' Association and the Associated Jobbers of Los Angeles be permitted to intervene and to become parties respondent, in accordance with petitions filed in writing, provided that such intervention shall not delay a hearing of the causes.

103 *Extract from journal of United States Commerce Court, proceedings of April 3, 1911.*

No. 1. SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.

No. 2. ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.

Said causes came on for hearing before the court on the motion of the Interstate Commerce Commission to proceed to final determination of the issues involved without receiving the testimony and other evidence, Mr. P. J. Farrell appearing in behalf of the Interstate Commerce Commission, and Messrs. Robert Dunlap and C. W. Durbrow in behalf of the petitioners. Thereupon further consideration of said causes was postponed, upon the application of Honorable James A. Fowler, Assistant Attorney General of the United States, in order to give him opportunity to file a motion on behalf of the United States.

104 And afterwards, to wit, on the 5th day of April, 1911, there was filed in the clerk's office of the United States Commerce

Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

Motion of the United States to dismiss.

105 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka and Santa Fe Railway Company, petitioners,
v.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.
No. 1.

Motion to dismiss.

The Attorney General of the United States, in behalf of the United States, moves that this cause be dismissed for the following reasons:

I.

The petition and the exhibits thereto show that, at the instance of an association representing the shippers interested in the matter, the Interstate Commerce Commission had a regular hearing and investigation; that it had full jurisdiction over each and every question considered and determined by it; that after such hearing the commission found and reported a conclusion, upon which the order attacked is based, that the industrial side-tracks, for the placing of cars upon which petitioners charge shippers $2.50 per car, are in fact but a portion of petitioners' terminal facilities in the city of San Francisco; that in this respect they bear the same relation to petitioners' lines of road as the team tracks, for the placing cars upon which petitioners charge nothing; that the service rendered in setting cars upon said tracks is not an additional service justifying an additional charge, but is a service paid for in the payment of charges for transportation; and that the charge of $2.50 per car for setting cars upon said industrial tracks, in addition to the charges for transportation
106 under petitioners' rates as a whole, is unreasonable and unjust.

II.

The petition and exhibits thereto show that the Interstate Commerce Commission, at the instance of an association representing the shippers, had a regular hearing and investigation, as aforesaid; that it had jurisdiction of every question considered and determined, as aforesaid; that after said hearing they reported a conclusion, as aforesaid, that the industrial side-tracks are but a part of petitioners' terminal facilities in San Francisco, and in that respect bear the same relation to petitioners' lines of road as the team tracks, as aforesaid; that the service rendered in setting the cars upon said tracks is not an additional service, but is a service paid for in the payment of charges for transportation, as aforesaid; that for the same service in many other cities, the merchants and producers of which directly compete with the merchants and producers of San Francisco, petitioners make no charges; and that the charging of said $2.50 per car constitutes an unjust and unreasonable regulation and practice.

III.

The petition and exhibits thereto show that the Interstate Commerce Commission, at the instance of an association representing the shippers, had a regular hearing and investigation, as aforesaid; that it had jurisdiction of every question considered and determined, as aforesaid; that after said hearing the reported a conclusion, as aforesaid, that the industrial side-tracks are but a part of petitioners' terminal facilities in the city of San Francisco, and in that respect bear the same relation to petitioners' lines of road as the team tracks, as aforesaid; that the service rendered in setting the cars upon said tracks is not an additional service, but is a service paid for in the payment of charges for transportation, as aforesaid; that for the same service in many other cities, the merchants
107 and producers of which directly compete with the merchants and producers of San Francisco, petitioners make no charges; and that the charging of said $2.50 per car is unjustly discriminatory, and is unjustly preferential and prejudicial against those from whom said charge is exacted.

IV.

The petition and exhibits thereto fail to show that the order of the commission attacked in the petition will, if enforced, deprive petitioners of their property without due process of law or without just compensation, within the meaning of the fifth amendment to the Constitution of the United States.

Wherefore and for divers other good causes appearing in the petition and exhibits thereto, this defendant moves that the cause be dismissed and prays the judgment of the court whether it shall be compelled to make answer to the petition, and that it be hence dismissed.

GEO. W. WICKERSHAM,
Attorney General of the United States.

108 *Extract from journal of United States Commerce Court, proceedings of April 10, 1911.*

No. 1. SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.

No. 2. ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT, Pacific Coast Jobbers and Manufacturers' Asso. and Associated Jobbers of Los Angeles, interveners.

In said cause it was ordered: That the report and order of the Interstate Commerce Commission in the Los Angeles case be deemed a part of the record in the San Francisco case.

Said causes came on for hearing before the court, on the motions of the United States to dismiss the petitions, Hon. James A. Fowler appearing on behalf of the United States and Mr. Seth Mann on behalf of the interveners.

109 *Extract from journal of United States Commerce Court, proceedings of April 11, 1911.*

No. 1. SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.

No. 2. ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT, Pacific Coast Jobbers and Manufacturers' Asso. and Associated Jobbers of Los Angeles, interveners.

Said causes came on for further hearing before the court upon the motions to dismiss, and the arguments of counsel were concluded, Mr. Seth Mann appearing in behalf of the interveners, Messrs. Robert Dunlap and H. A. Scandrett in behalf of the petitioners, and Mr. P. J. Farrell in behalf of the Interstate Commerce Commission. Thereupon said causes were taken under advisement by the court.

110 And afterwards, to wit, on the 20th day of July, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain opinion, in the words and figures following, to wit:

Opinion.

111 United States Commerce Court.

No. 1.—April session, 1911.

SOUTHERN PACIFIC COMPANY AND ATCHISON, TOPEKA & Santa Fe Railway Company, petitioners,
v.
INTERSTATE COMMERCE COMMISSION AND THE UNITED States, respondents.

Robert Dunlap, T. J. Norton, F. C. Dillard, H. A. Scandrett, and C. W. Durbrow, solicitors for petitioners.

Gardiner Lathrop and W. F. Herrin, of counsel.

J. A. Fowler, Assistant Attorney General; Blackburn Esterline, Special Assistant Attorney General; and P. J. Farrell, Solicitor for Interstate Commerce Commission, for respondents.

Seth Mann, for interveners.

[July 20, 1911.]

CARLAND, Judge:

The bill in this case was filed for the same purpose as the bill in case No. 2, Atchison, Topeka & Santa Fe Railway Co., Southern Pacific Co., and San Pedro, Los Angeles & Salt Lake Railroad Co. v. Interstate Commerce Commission and United States, except that the switching service for which a charge is claimed is performed at the city of San Francisco, Cal.

For the reasons stated in the opinion filed in case No. 2, above mentioned, the motion for a temporary injunction made by the petitioners is granted, and the motion to dismiss made by the United States and the Interstate Commerce Commission is denied.

MACK, Judge, dissenting.

112 United States Commerce Court.

No. 2.—April session, 1911.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED States, respondents.

Robert Dunlap, *T. J. Norton*, *F. C. Dillard*, *H. A. Scandrett*, and *C. W. Durbrow*, solicitors for petitioners.

Gardner Lathrop and *W. F. Herrin*, of counsel.

J. A. Fowler, Assistant Attorney General; *Blackburn Esterline*, Special Assistant Attorney General; and *P. J. Farrell*, Solicitor for Interstate Commerce Commission, for respondent.

Seth Mann, for interveners.

[July 20, 1911.]

CARLAND, *Judge:*

This case has been submitted upon a motion for a temporary injunction made by the petitioners, and upon a motion to dismiss made by the United States and the Interstate Commerce Commission. The motion to dismiss is made by virtue of the provisions of section 1 of the act to create a Commerce Court, which allows such a motion to be made where it is claimed the petition does not set forth a cause of action. As determinative of these motions, our view is necessarily limited to the facts which are well pleaded in the petition. These facts, as they appear in the petition, are substantially as follows:

The petitioners are railroad corporations, organized under the laws of the States of Kansas, Kentucky, and Utah, respectively. At all times each of said petitioners and their respective predecessors in interest have maintained and do now maintain public freight depot

buildings theretofore, respectively, established by them in said city of Los Angeles upon or adjacent to their respective tracks connecting with their respective main tracks in said city where freight in less than carload lots is and has been received for transportation for shippers in said city destined to various points upon their respective lines of railroad or points upon connecting lines of railroad in the United States, and where such freight transported from various points to Los Angeles is delivered to the owners or consignees thereof.

113 Each of said petitioners and their respective predecessors in interest have also located and established and have maintained and do now maintain what are known as "team tracks" and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in general for the loading therein of carload freight for transportation to various points upon their respective lines of railroad in the United States, and where also is set and placed for the unloading thereof by consignees or owners in said city, who have not been favored with the private or special sidetrack facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere to such owners or consignees in said city of Los Angeles; and said team tracks and freight sheds are so connected with the respective main line tracks of the petitioners in said city that cars loaded with carload freight may be readily transferred from said main line tracks to said team tracks and sheds; and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said team tracks and freight sheds constitute and have constituted the places where the respective petitioners receive and have heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of Los Angeles; and the same are and have been in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds, and buildings above shown constitute the places established as depots or stations by each of the petitioners in said city of Los Angeles for the receipt, handling, and delivery of carload and less than carload freight intrastate and interstate. Said facilities so established and maintained for the receipt, handling, and delivery of less than carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or at any day can be tendered. The freight sheds and team tracks established and maintained for the receipt, handling, and delivery of carload freight are sufficient to handle all the carload freight coming into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are suffi-

cient to handle more than double the number of carloads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all carload freight can be received, handled, and delivered. In addition to this each of petitioners has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team tracks; so that there is no necessity in the proper conduct of petitioners' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of cartage which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth.

114

Each of the petitioners, as well as their respective predecessors in interest, have heretofore severally or individually entered into contracts or agreements with certain individual shippers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of spur tracks from the respective plant or industry in said city to and connecting with the yard tracks of the respective petitioners in said city where trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company and a part by such shipper. But such tracks were constructed especially to accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective petitioners carload freight consigned to or shipped by the owner or operator of said plant, and therefrom and thereby the owner or operator of such plant or industry located upon such spur or side track was relieved from the necessity of transferring carload freight to and from said team tracks and from or to such plant or industry by dray or wagon at a higher cost and greater risk; and that the shipper at such industry or plant by reason of such side-track facilities is given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks.

In such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years, usually less than five, a spur track to connect such plant or industry with the railroad of the railway company. But in such contracts it was generally provided that while the railway company might make use of the proposed track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such

plant or industry, but that the traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

In the contracts made by the Southern Pacific Co. covering the construction and maintenance of such industrial or spur tracks, it was generally provided, among other things, as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Co.), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Co., and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Co., whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Co., and said Southern Pacific Co. shall keep said track in repair.

115 "4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Co. may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Co., provided rate of charge shall be as low as that from or to point in question by any other rail route."

The contracts made for such purposes by the Atchison, Topeka & Santa Fe Railway Co. contained among other things the following provisions:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

The contracts made by the San Pedro, Los Angeles & Salt Lake Railroad Co. covering the cost and maintenance of such spur or industrial tracks contained provisions similar to those of the Southern Pacific Co. above set forth.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract, as aforesaid, by the

Atchison, Topeka & Santa Fe Railway Co., or its predecessors in interest, in said city of Los Angeles, are distant from its main track in said city anywhere from one-fifth to 1½ miles, and in order to receive a carload of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of the said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in the said city of Los Angeles located upon the spur tracks heretofore constructed under contract as aforesaid by the Southern Pacific Co. or its predecessor in interest in said city of Los Angeles are distant from its main track in said city anywhere from 200 feet to 7 miles, and in order to receive a carload of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner an empty car and set the same at such industry where the same
116 can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the San Pedro, Los Angeles & Salt Lake Railroad Co. in said city are distant from its main track in said city anywhere from one-fifth to 4 miles, and in order to receive a carload of freight from said plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur track to the industry or plant in question and to

place the same convenient thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

In such contracts governing the construction and maintenance of such industrial tracks no specific sum was fixed or prescribed in case the railway company should perform the aforesaid special service of receiving or delivering freight at the plant or industry in question, but at the time of executing such contract the usual charge separately and specially set forth in the respective tariffs of petitioners for making such special deliveries or such special receipt of such carload freight, involving the switching service to and from such plant or industry from and to the yards of respective petitioners where trains are made or broken up, had been generally established by each petitioner at the sum or price of $2.50 per car, and had for many years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angleles would be made, and such charge of $2.50 per car has generally been made, maintained, and collected from said shippers in Los Angeles for said special service as aforesaid.

The aforesaid service heretofore rendered by the respective railway companies of receiving carload freight at said industries or delivering the same to such industries or plants instead of at the team tracks or sheds is of great value to the owners or operators of such industries or plants and is worth much more than the sum of $2.50 per car inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other
117 charges which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have been thus favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into. The general or prevailing charge for drayage in Los Angeles is 50 cents a ton, which makes the cost to the consignee $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed by petitioners for delivering the consignment to or receiving the shipment at the door of the consignee's or shipper's warehouse.

In performing said special switching service involved in the receipt and delivery of carload freight at such industry or plant, petitioners are put to a much greater expense than if such freight was received or delivered on its team tracks or at its freight sheds.

Each of petitioners has made and established its rates of transportation to and from said city of Los Angeles from and to such points on their respective lines, and in many instances joint rates from and to points on many other railroads in the United States; they have duly published and filed with the Interstate Commerce Commission and posted in their respective stations where freight is received their respective schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less than carload lots and for carload freight; and in respect to less than carload freight the rates have been established and made to cover the receipt or delivery of such freight at the freight station of the respective railway company in said city; and in respect to carload freight rates established for the public in general contemplate receipt or delivery thereof upon or at the team tracks or sheds of the respective railway company; and in said tariffs it has been and is distinctly and separately provided and stated that where carload freight is received at or delivered to private industries located upon such industry tracks in said city of Los Angeles an additional charge—that is, a charge in addition to the rate fixed to and from Los Angeles, amounting to $2.50 per car—will be charged and collected for said special service of making delivery or receipt of carload freight to or at said plants or industries located in said city of Los Angeles upon such special industry tracks.

On account of water and other competition the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that petitioners do not receive for such transportation sums which they are justly entitled to and which they would otherwise be able to charge and collect.

On or about April 5, 1910, the Interstate Commerce Commission, having investigated the complaint of the Associated Jobbers of Los Angeles against petitioners wherein said charge of $2.50 per car was claimed to be unjust and illegal, made the following order:

"This case being at issue on complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report
118 containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries

located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

Petitioners complain that said order deprives them of all compensation for the said special services so rendered by them, respectively, and that said order is by reason thereof illegal and void. The petition prays that said order be annulled and that the Interstate Commerce Commission be perpetually enjoined from the enforcement thereof.

Whether or not the facts stated in the petition constitute a cause of action depends upon the question whether the petitioners have the lawful right to make the charge of $2.50 per car for the industrial track service mentioned. In the absence of special contract or usage to the contrary, under the common law carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. This rule, however, never was applied to railroads. They are exempt from the duty of personal delivery, and bound only to carry the goods to the depot or station to which they are destined and there hold or place them in a warehouse ready for delivery whenever the consignee or owner calls for them, after notifying the consignee or owner of their readiness to deliver.

Fenner v. *Buffalo, etc., R. Co.*, 44 N. Y., 505.
Whitbeck v. *Holland*, 45 N. Y., 13.
Chalk v. *Charlotte, etc., R. Co.*, 85 N. C., 423.
South, etc., Alabama R. Co. v. *Wood*, 66 Ala., 167.
New Orleans, etc., R. Co. v. *Tyson*, 46 Miss., 729.
State v. *Republican Valley R. Co.*, 17 Nebr., 617.
Francis v. *Dubuque, etc., R. Co.*, 25 Iowa, 60.
Evershed v. *London, etc., R. Co.*, 2 Q. B. Div., 254.

The order of the Interstate Commerce Commission complained of makes the report of the commission a part thereof and as said
119 order is set out in the petition the report also becomes a part of said petition. It is found in the order of the commission that the charge of $2.50 per car exacted by the several petitioners for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul is in violation of the act to regulate commerce. This conclusion is a conclusion of

law and of course is open to inquiry in this court. It is not stated in the order itself what particular section of the act to regulate commerce the charge of $2.50 per car for the services rendered by petitioners violates, but as the report of the commission is made a part of the order we are at liberty to examine said report with a view of ascertaining the views of the commission as to what particular provision of the act to regulate commerce the practice or charge of petitioners violates. In this examination we are limited to the report or opinion of the majority of the commission, the views of the minority not being open to consideration. (Interstate Commerce Commission v. Delaware, L. & W. R. R. Co., 220 U. S., 235.)

In the report of the commission we find the following language (18 I. C. C. Rep., 310):

"The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations both of these contentions are sound."

Again, it is said in the report, as follows:

"We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the steam tracks and other yards, form the terminal facilities of these carriers."

It is also stated in said report:

"We do not find in the record sufficient data upon which to base a finding as to the reasonableness of the amount of this charge of $2.50 for interline switching to these industrial tracks, and for the purpose of this present order will assume it to be reasonable."

Again, quoting from the report:

"The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle."

120 The commission condemned the charge of $2.50 per car made by the petitioners for delivering and receiving interstate carload freight to and from industries located upon spurs or side-

tracks within their respective switching limits when such carload freight was moving incidentally to a system-line haul as illegal and unjust. As the commission did not find the charge of $2.50 to be excessive in and of itself, we conclude that the commission found that the charge violated section 1 of the act to regulate commerce, the charge being unjust because on the theory of the report of the commission the carrier had already been paid for this service by payment of the regular tariff from point of origin to destination.

It is claimed by counsel for the United States, under the decisions of the Supreme Court in Interstate Commerce Commission v. Illinois Central R. R. Co. (215 U. S., 415); Baltimore & Ohio R. R. Co. v. Pitcairn (215 U. S., 481); and Interstate Commerce Commission v. Delaware, L. & W. Ry. Co. (219 U. S., ———), that the findings thus made by the commission are conclusive upon this court, and that these findings forming a part of the petition, it conclusively appears therefrom that no cause of action has been stated which would warrant this court, taking all the allegations of the petition as true, in granting the relief prayed for. We are not unmindful of the rulings of the Supreme Court in the cases mentioned in regard to the force and effect to be given to the findings of the commission and have no disposition in any way to avoid the binding force of such rulings. We think that it is fair to say that the conclusion of the commission that the charge of $2.50 per car for the service named was illegal and unjust was based upon two findings: First, that the industrial track upon which the service was rendered is a terminal facility of the railroad and not a plant facility of the industry to which it leads; and, second, that the service for which the charge is made is the same service as that which is performed by the carrier in delivering freight at its depot or team tracks.

We do not think that whether the industrial track is a plant facility or a terminal facility of the railroad necessarily determines the legality of the charge. The commission in one part of its report found that the contentions of both parties within certain limits were sound. The real question presented is: "Is the carrier lawfully entitled to charge the sum of $2.50 per car for the service performed upon the industrial tracks?" And we do not think that question can be determined alone by the consideration whether the industrial track is a plant facility or a terminal facility of the railroad, for the reason that it is the service which is performed upon the industrial track that is the question, regardless of the ownership of the track.

So far as the finding of the commission that the industrial track service is the same as the team track or depot service is concerned, we are constrained to hold that it is not a finding which precludes this court from coming to a different conclusion upon the present record. In cases where there is a substantial conflict in the evidence or testimony upon which a finding of the commission is based, we would feel bound by the finding unless clearly and palpably against

the weight of the testimony; but we do not think that this court is concluded by a finding of the commission based upon admitted facts which in no wise tend to sustain the conclusion reached. In
121 other words, as in this case, where all the facts are undisputed, we do not think that the commission can by an ultimate finding based upon the undisputed facts preclude this court from reaching a conclusion of its own upon such undisputed and admitted facts. Where the facts are undisputed there is no occasion for facts to be found, and the ultimate conclusion of the commission is a mixed question of law and fact which certainly ought not to be held to be conclusive upon this court.

To say that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to 7 miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, is so contrary to the admitted physical facts as to be wholly untenable. It seems clear to us that in the absence of statute the carriers in the present case are not bound to perform this industrial track service, and if they voluntarily perform it under an arrangement with the owner of the industrial plant we see no reason why they may not charge a reasonable price therefor, and the charge in question is conceded to be reasonable.

We are not at liberty to view the case at this time except as it appears from the petition, and we are wholly unable to come to the conclusion from the facts therein stated, which are to be taken as admitted for the purpose of this motion, that the industrial or spur track service is the same service that the carrier performs by delivery to the team track or at the depot, and therefore are unable to say that the general tariff charge on freight shipped to Los Angeles from points of origin would include a delivery at the industrial plant. Nor are we able to see how it can be said that the general tariff charge includes a delivery at the industrial plant. When it is said that the general tariff charge for the transportation of freight to Los Angeles pays for the delivery of such freight at the industrial plant, upon what authority is this declaration made? Who is to say that it pays for delivery at the industrial plant? The carrier, in the first instance, is entitled to fix its tariff charges for the transportation of freight, and in this instance has fixed a certain tariff for the delivery of freight to Los Angeles. At the same time that it fixed this general tariff is fixed a tariff, which it filed with the Interstate Commerce Commission, for this industrial track service, so that the only party in the first instance that had anything to say about what the general tariff charge should be was the carrier, and it has said that the general tariff charge only carries the freight to the depot or the team tracks. There is no evidence whatever that the carrier ever waived in any way its right to charge for the special service on the industrial tracks. There may be conditions under

which the carrier may waive its right to make a charge for terminal service, as was said in Interstate Commerce Commission v. Stickney (215 U. S., 105):

"The carrier is under no obligation to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The petition in the present case shows that before these tracks were constructed this charge was contained in the general tariffs of
122 petitioners and that said charge for industrial track service was known to the different proprietors and owners of industrial plants and that they consented to such charge. It is admitted, of course, that such consent or implied contract on the part of the industrial plant owners would be avoided if it was in conflict with any law of Congress regulating interstate commerce. If the carrier is not bound by law to deliver freight at the industrial plant, and it can not be successfully contended that it is, then it follows as a necessary consequence that this industrial track service is a special service and is not a service which the carrier is bound to perform for the general tariff charge for the transportation of freight destined to Los Angeles.

The commission made no finding that the charge of $2.50 in connection with the transportation of cars to and from industrial plants constituted an undue preference or advantage or was discriminatory in any way, and these questions, if they exist at all, will not be discussed.

From what has been stated in this opinion as the views of this court, it necessarily results that the motion to dismiss must be denied, and an order will be granted suspending the order of the Interstate Commerce Commission complained of until the further order of this court.

MACK, Judge, dissents.

123 THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, respondents.

MACK, J., dissenting.

In my opinion, the finding of the commission, that the industry track service in the city of Los Angeles is substantially the same as the team-track and depot service, is binding upon this court. I agree that this court should not be concluded by a finding of the commission, based upon admitted facts which in no wise tend to sustain the conclusion reached, but, in my judgment, the facts in this case, as

related by the commission in its report, fully justify its conclusions. The commission finds as follows:

"Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. * * *

"These industry spurs are not private, in that the carrier may use them for purposes of its own, as for storage of cars, as leads to other industries, and sometimes for public delivery. They are often laid upon public streets and over private property, are operated exclusively by the railroad with its own engines, and furnish means of interindustry conveyance by rail, for which the carrier properly imposes a switching charge. * * *

"We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers. * * *

"Again it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards,
124 which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered, some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. * * * After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery."

If, then, these industry tracks are, as the commission, in my judgment, correctly finds them to be, terminal facilities of the railroad, and if, as the commission further finds, the service for which the charge in question is made is substantially the same service as that which is performed by the carrier in delivering freight on its team tracks, the commission was justified in prohibiting, as an unreasonable practice, the additional so-called switching charge made for the delivery at the industry tracks.

While under the American practice, as distinguished from the English practice, the transportation rate has always included the

charge for the use of the ordinary terminal facilities—that is, the use of depots or tracks for the purpose of delivery—it may well be that the commission has the right, in regulating the practices of the carriers, to require a separation of the transportation rate into its elements. It may well be that the dangers of undue preferences and unjust discriminations in favor of large industries, which can afford to have industry tracks, may not only justify but in the future require the commission so to act, and that, too, despite the common-law principle enunciated in Covington Stock Yards v. Keith, 139 U. S., 128, and conceded in complainant's brief in the following language:

"Of course, it may rightfully be assumed that the charge established by the carrier for carrying goods to and from the given
125 cities does necessarily embrace the use of instrumentalities which the carrier must furnish to accomplish the carriage, such as engines, cars, the railroad, and the depots and delivering yards where goods of the public in general may be received and delivered. In other words, a double charge may not be imposed for the same thing."

If such action should be taken, shippers located on industry tracks, whose cars go directly from the breaking-up yards to these tracks, could not be compelled to pay for the use of the team-track terminal facilities, but on the other hand they could be compelled to pay for the use of terminal facilities on the industry tracks. We need not now determine whether, in that event, a higher rate for industry than for team-track delivery could be permitted or compelled if the cost of each delivery, to the carrier, were the same, in order to prevent the large shipper, located on an industry track, from gaining such advantage as would naturally accure to him from his location.

The commission, however, has not yet attempted to exercise this possible power. It has acted on the basis of the long-established American practice, which it was justified in assuming would be continued. Under that practice the shippers on industry tracks pay a delivery charge in the regular transportation rate. Nothing in the order sought to be enjoined compels the railroads to continue to maintain the industry tracks or to make delivery thereon. If, however, they voluntarily make delivery thereon, instead of on their other tracks, they are prohibited from exacting additional compensation for a service found to be substantially the same as that for which payment has already been made.

Moreover, nothing in the order prevents the railroads from making different transportation charges to the various depots or tracks in the city. A difference of seven miles in the length of the haul might under some circumstances justify a difference in the transportation rate. That rate, however, is not in question on this record. Moreover, this extreme difference in the length of
126 some of the hauls does not, in my judgment, justify the court in holding as untenable the finding of the commission, based

on a careful consideration of all the physical and economic conditions, that industry and team track delivery in these cities are practically identical.

The conclusion of the commission is, in substance, that in as much as under the American practice no separate charge is made for team track delivery, but only a single charge for transportation, including delivery, a separate charge for the similar, no more costly, and voluntarily substituted spur-track delivery is an unreasonable practice. An order prohibiting the charge is, in my judgment, within the powers granted to it under section fifteen of the act to regulate commerce.

127 And on the same day, to wit, the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order denying motion to dismiss and suspending order of Interstate Commerce Commission

128 In the United States Commerce Court.

Southern Pacific Company and The Atchison, Topeka & Santa Fe Railway Company, petitioners, *vs.* Interstate Commerce Commission and The United States, respondents.	No. 1. April session, 1911.

This cause coming on to be heard on motion of petitioners for a preliminary injunction, and on motion of respondents to dismiss the bill of complainant on the ground that it does not state facts sufficient to constitute a cause of action, and having been argued by counsel, Mr. Robert Dunlap, Mr. C. W. Durbrow, and Mr. H. A. Scandrett appearing for petitioners; Mr. P. J. Farrell for the Interstate Commerce Commission; Mr. Assistant Attorney General Fowler for the United States; and Mr. Seth Mann for certain interveners, and upon due consideration thereof it is thereupon this 20th day of July, 1911, *Ordered*, That said motion to dismiss be, and the same is hereby, denied.

It is further ordered, That the order of the Interstate Commerce Commission set forth in said bill of complaint, and a copy of which is hereto annexed, dated on or about April 11, 1910, and the effective date of which has been postponed by the commission to August 1, 1911, be, and the same is hereby, suspended until the further order of this court.

By the court:

Martin A. Knapp,
Presiding Judge.

129 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of April, A. D. 1910.

PRESENT:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
} Commissioners.

No. 1649.

PACIFIC COAST JOBBERS' & MANUFACTURERS' ASSOCIATION,
v.
SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA & Santa Fe Railway Company.

This case being at issue on complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at San Francisco, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce.

It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter to abstain, from exacting their present charge of $2.50 per car for
129½ delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of San Francisco, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of San Francisco, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

130 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 21st day of July, 1911, I served the within order on the United States by leaving a copy thereof with Blackburn Esterline, its designated agent, at the Department of Justice, the same being his office in the city of Washington, District of Columbia.

July 21st, 1911.

F. J. STAREK, *Marshal.*
By JAMES L. MURPHY, *Deputy.*

Copy handed to Mrs. B. M. Power.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 21st day of July, 1911, I served the within order on the Interstate Commerce Commission by leaving a copy thereof with its chairman, Judson C. Clements, its designated agent, at Washington, D. C., the same being his office in the city of Washington, District of Columbia.

July 21st, 1911.

F. J. STAREK, *Marshal.*
By JAMES L. MURPHY, *Deputy.*

Copy handed to A. R. Mackley.

131 And afterwards, to wit, on the 18th day of August, 1911, came the respondent and the intervening respondents, by their solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain petition for appeal in the words and figures following, to wit:

Petition for appeal.

132 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka & Sante Fe Railway Company, petitioners, *v.* INTERSTATE COMMERCE COMMISSION, respondent; The United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents.	April session, 1911. No. 1.

Petition for Appeal.

The Interstate Commerce Commission, respondent; The United States of America, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents, feeling themselves aggrieved by the interlocutory order or decree of the Commerce Court, entered July

20, 1911, suspending and enjoining the order of the Interstate Commerce Commission, by their respective counsel, pray an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the said respondent and the said intervening respondents consider said order or decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And the said respondent and the said intervening respondents further pray that a transcript of the record, proceedings, and papers, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

August 17, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
GEO. W. WICKERSHAM,
Attorney General of the United States.
SETH MANN,
Solicitor for Associated Jobbers of Los Angles and Pacific Coast Jobbers' and Manufacturers' Association.

133 And on the same day, to wit, the 18th day of August, 1911, came the respondent and the intervening respondents, by their solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain assignment of errors, in the words and figures following, to wit:

Assignment of errors.

134 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka & Santa Fe Railway Company, petitioners, *v.* INTERSTATE COMMERCE COMMISSION, respondent, The United States, intervening respondent, and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents.	April session, 1911. No. 1.

Assignment of errors.

Come now the Interstate Commerce Commission, respondent; The United States of America, intervening respondent, and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents, by their respective counsel and in connection with their application for appeal file the

following assignment of errors on which they will rely upon their appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court, entered July 20, 1911, in the above entitled cause.

The Commerce Court erred—

I.

In granting the motion for a preliminary injunction and in suspending the order of the Interstate Commerce Commission until the further order of the court, (a) for that the petition does not set forth any cause of action and is insufficient to justify the order or decree suspending the order of the Interstate Commerce Commission or to form the basis for any relief; (b) for that in the said petition there is no equity upon which to base the order or decree suspending the order of the Interstate Commerce Commission
135 or to form the basis for any relief; (c) for that the said petition does not show that in making its said order the Interstate Commerce Commission acted beyond its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) for that the said petition does not show that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States, or any other right of the said petitioners over which the Commerce Court may exercise jurisdiction.

II.

In suspending the order of the Interstate Commerce Commission, for that the said order is not open to attack in the courts, because the said Interstate Commerce Commission in making and entering the said order kept within the powers conferred upon it by the statute.

III.

In suspending and enjoining the order of the Interstate Commerce Commission, for that the petition and exhibits thereto show that the Pacific Coast Jobbers' and Manufacturers' Association, representing the shippers interested in the subject matter, did file before the Interstate Commerce Commission their certain petition against the said two railroad companies which briefly stated the facts; that the said two railroad companies named did file their separate answers in writing to the said petition; that a full hearing was had by the said Interstate Commerce Commission in the premises, and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission which states its conclusion, together with its decision, order, or requirement in
136 the premises, it found as a fact that the industrial side tracks and spur tracks for the placing of cars upon which the petitioners charge shippers $2.50 per car are a portion of petitioners'

terminal facilities in the city of San Francisco and bear the same relation to petitioners' lines of railroad as the team tracks for the placing of cars upon which the petitioners make no charge; and found as a further fact that the services rendered in setting cars upon said tracks is not an additional service justifying an additional charge, but is a service the payment for which is covered by the regular transportation rates and charges; and found as a further fact that the charge of $2.50 per car for setting cars upon said industrial tracks and spur tracks in addition to the rates for transportation under petitioners' rates as a whole is unjust and unreasonable and in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court, and the matters and things alleged in the petition are insufficient to form the basis for the suspension order or for any relief.

IV.

In suspending and enjoining the order of the Interstate Commerce Commission, for that the petition and the exhibits thereto show that the Pacific Coast Jobbers' and Manufacturers' Association representing the shippers interested in the subject matter did file before the Interstate Commerce Commission their certain petition against the said two railroad companies which briefly stated the facts; that the said two railroad companies did file their separate answers in writing to the said petition; that a full hearing was had by the said Interstate Commerce Commission in the premises, and that in its report in writing in respect to the matters and things heard and determined
137 by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, it found as a fact that the said industrial tracks and spur tracks are but a part of the petitioners' terminal facilities in the city of San Francisco and bear the same relation to petitioners' lines of railroad as the said team tracks; and found as a further fact that the service rendered in setting the cars upon industrial side tracks and spur tracks is not an additional service rendered, but is a service covered by the regular transportation rates and charges; and found as a further fact that the carriers of the United States universally treat such industrial side tracks and spur tracks as portions of their terminals, making no extra charge for services thereto when the carrier received the benefit of the line haul out or in, the only three exceptions being Los Angeles, San Francisco, and San Diego; and found as a further fact that each of the industrial tracks or spur tracks referred to in its report is a railroad terminal at which the carrier receives and delivers freight; and that the charge of said $2.50 per car for such delivery on said industrial tracks or spur tracks constitutes an unjust and unreasonable regulation and practice in violation of the act to regulate commerce; all of which were matters and

things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court, and the matters and things alleged in the petition are insufficient to form the basis for the suspension order or for any relief.

V.

In suspending and enjoining the order of the Interstate Commerce Commission, for that the petition and the exhibits thereto show that the Pacific Coast Jobbers' and Manufacturers' Association representing the shippers interested in the subject matter did
138 file before the Interstate Commerce Commission their certain petition against the said two railroad companies which briefly stated the facts; that the said two railroad companies did file their separate answers in writing to the said petition; that a full hearing was had by the said Interstate Commerce Commission in the premises; and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, it found as a fact that the said industrial side tracks and spur tracks are but a part of the petitioners' terminal facilities in the city of San Francisco, and bear the same relation to petitioners' lines of railroads as the said team tracks; and found as a further fact that the service rendered in setting the cars upon industrial side tracks and spur tracks is not an additional service rendered, but is a service covered by the regular transportation rates and charges; and found as a further fact that there are 97 places in California to which coast terminal rates apply which are lower than to intermediate points, and that in only the cities of Los Angeles, San Francisco, and San Diego is there such a charge for spur track delivery, though in many such places such delivery is furnished: that the carriers serving the cities of Portland, Seattle, Tacoma, and a number of other points to the north impose no such charge, and that to the east where petitioners' lines have their termini in cities competing with San Francisco this charge is unknown: and that the charge of said $2.50 per car is unjustly discriminatory and unjustly preferential and prejudicial against those from whom the said charge is exacted, and is in violation of the act to regulate commerce; all of which were matters and things within the power of that body
139 to hear and determine, and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to form the basis for the suspension order or for any relief.

VI.

In disregarding and overthrowing the findings of the Interstate Commerce Commission and in substituting the judgment of the Commerce Court for the judgment of the commission, (a) in holding that

the Commerce Court is not bound by the findings of the commission that the industrial track service is the same as the team track service; (b) in holding that the Commerce Court is not bound by the findings of the Interstate Commerce Commission except in cases where there is a substantial conflict in the evidence or testimony upon which a finding of the commission is based; (c) in holding that the Commerce Court may consider the weight of the testimony; (d) in holding that the ultimate conclusion of the Interstate Commerce Commission consisting of mixed questions of law and fact is not conclusive upon the court.

VII.

In disregarding and overthrowing the findings of the Interstate Commerce Commission and substituting the judgment of the Commerce Court for the judgment of the Interstate Commerce Commission, (a) in holding that the transportation of cars and freight to and from industrial plants is not the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot or at the team tracks in San Francisco; (b) in holding that in the absence of statute the carriers in the present case are not bound to perform this industrial track service, and
140 that if they voluntarily perform it, they may make a reasonable charge therefor; (c) in holding that the general tariff charge covers delivery only to the team tracks and does not cover delivery to and over the industrial or spur tracks.

VIII.

In disregarding and overthrowing the findings of the Interstate Commerce Commission and substituting the judgment of the Commerce Court for the judgment of the Interstate Commerce Commission, (a) in holding that the general tariff charge for the transportation of freight to San Francisco does not include payment for the delivery of such freight to the industrial plants; (b) and in holding that the tariff charge fixed by the carrier only carries the freight to the team tracks; (c) and in holding that the general tariff charge fixed by the carrier which only carries the freight to the team tracks and the tariff charge fixed by the carrier for the industrial track service are conclusive that the general tariff charge for the transportation of freight to San Francisco does not include delivery to the industrial plants.

IX.

In holding that the contracts made and entered into by and between the petitioners and the shippers or owners of the industrial plants relating to the construction, operation, and maintenance of the industrail tracks or spur tracks are valid, binding, and enforceable notwithstanding the report and order of the Interstate Commerce Commission.

141

X.

In holding that "If the carrier is not bound by law to deliver freight at the industrial plant, and it cannot be successfully contended that it is, then it follows as a necessary consequence that this industrial track service is a special service and is not a service which the carrier is bound to perform for the general tariff charge for the transportation of freight destined to San Francisco."

XI.

In abusing its discretion in suspending the order of the Interstate Commerce Commission, for that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion together with its decision, order, or requirement in the premises, said Interstate Commerce Commission found that the charge of $2.50 per car exacted by the several petitioners for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits at San Francisco, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to form the basis for the order of suspension or for any relief.

142

XII.

In suspending and enjoining the order of the Interstate Commerce Commission for that in the petition and the exhibits referred to therein and attached thereto, and on the hearing of the application for a temporary or interlocutory order suspending and enjoining the order of the Interstate Commerce Commission, there is not and was not presented a single, distinct, and dominant proposition of law which the Interstate Commerce Commission had rejected and the exact influence of which, in its decision, could be estimated.

XIII.

In granting the motion for a preliminary injunction and in suspending the order of the Interstate Commerce Commission on the petition alone of the said petitioners and in disregarding and ignoring the answer of the Interstate Commerce Commission on file in said cause which denies under oath all of the material allegations of the said petition.

XIV.

In not sustaining the motion of the United States, intervener, to dismiss the cause.

XV.

In overruling the motion of the United States, intervener, to dismiss the said cause.

143 Wherefore said respondent and intervening respondents pray that the said interlocutory order or decree of the Commerce Court entered July 20, 1911, be reversed, annulled, and set aside and that the said petition be dismissed, and for such other and further order as may be appropriate.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

GEO. W. WICKERSHAM,
Attorney General of the United States.

SETH MANN,
Solicitor for Associated Jobbers of Los Angeles and Pacific Coast Jobbers and Manufacturers' Association.

AUGUST 17, 1911.

144 And afterwards, to wit, on the 19th day of August, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order allowing appeal.

145 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka & Santa Fe Railway Company, petitioners. *v.* INTERSTATE COMMERCE COMMISSION, respondent; The United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers and Manufacturers' Association, intervening respondents.	April session, 1911. No. 1.

Order allowing appeal.

Be it remembered that in the above-entitled cause, on this 18th day of August, 1911, the Interstate Commerce Commission, respondent; The United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers and Manufacturers' Association, intervening respondents, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered July 20, 1911, and having at the same time made and filed their

assignment of errors, and having in all respects conformed to the statute and the rules of the court in such case made and provided—

It is ordered and decreed, That the said appeal be, and the same is hereby, allowed as prayed, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

R. W. ARCHBALD,
Judge of the United States Commerce Court.

AUGUST 18, 1911.

146 United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka & Santa Fe Railway Company, petitioners, *v.* INTERSTATE COMMERCE COMMISSION, respondent, The United States, intervening respondent, and Pacific Coast Jobbers and Manufacturers' Association and Associated Jobbers of Los Angeles, intervening respondents.	April session, 1911. No. 1.

Pracipe for record.

To the clerk of said court:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the clerk of the Supreme Court of the United States upon the appeal of the respondent and the intervening respondents, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Bill of complaint.

Chancery subpœna.

Certificate of the Attorney General to expedite the hearing.

Order of Interstate Commerce Commission postponing date on which its order sought to be enjoined became effective.

Appearance of P. J. Farrell, Esq., solicitor for Interstate Commerce Commission.

Answer of Interstate Commerce Commission.

Replication to said answer.

Stipulation to transfer cause to the United States Commerce Court.

Order transferring cause to the United States Commerce Court.

147 Motion of Interstate Commerce Commission to proceed to final hearing without receiving testimony or other evidence.

Petition of intervention of Pacific Coast Jobbers' and Manufacturers' Association.

Petition of intervention of the Associated Jobbers of Los Angeles.
Order permitting said interveners to intervene.
Order permitting United States to intervene.
Motion of the United States to dismiss.
Opinion of the United States Commerce Court, and opinion of the United States Commerce Court in No. 2.
Order denying motion to dismiss and suspending order of the Interstate Commerce Commission with a copy of the last-mentioned order.
Service of said orders upon the Interstate Commerce Commission and the United States.
Petition for appeal, assignment of errors, and order allowing appeal.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
SETH MANN,
Solicitor for Pacific Coast Jobbers and Manufacturers' Association and Associated Jobbers of Los Angeles.

148 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka & Santa Fe Railway Company, petitioners,
vs.
THE INTERSTATE COMMERCE COMMISSION, respondent; The United States, Pacific Coast Jobbers & Manufacturers' Association, and Associated Jobbers of Los Angeles, intervening respondents. } No. 1.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 147, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the præcipe filed in the clerk's office of said court on the 6th day of September, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 15th day of September, A. D. 1911.

[SEAL.]

G. F. SNYDER, *Clerk.*
By W. S. HINMAN,
Deputy Clerk.

149 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka & Santa Fe Railway Company, petitioners,
v.
INTERSTATE COMMERCE COMMISSION, RESPONDENT; The United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers and Manufacturers' Association, intervening respondents.

April session, 1911. No. 1.

Citation on appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Commerce Court, Washington, D. C., wherein the Interstate Commerce Commission, the United States of America, and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association are appellants and Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company are appellees, to show cause, if any there be, why the order or decree of the United States Commerce Court against the said appellants, as in the said petition of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Martin A. Knapp, presiding judge of the United States Commerce Court, this 18th day of August, A. D. 1911.

[SEAL.]

G. F. SNYDER,
Clerk of the United States Commerce Court.
W. S. HINMAN,
Deputy Clerk.

Allowed:
R. W. ARCHBALD,
Judge of the United States Commerce Court.

150 Service of a copy of the within citation is hereby admitted this 23rd day of August, A. D. 1911.

F. C. DILLARD,
Solicitor for Southern Pacific Company.
ROBERT DUNLAP,
T. J. NORTON,
Solicitors for the Atchison, Topeka & Santa Fe Railway Company.

(Indorsement on cover:) File No. 22862. United States Commerce Court. Term No. 430. The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles and Pacific Coast Jobbers and Manufacturers Association, appellants, *vs.* Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company. Filed September 21, 1911. File No. 22862.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, [redacted]. 1913

No. [redacted]. 98

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, APPELLANTS,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED SEPTEMBER 21, 1911.

(22863)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 431.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, APPELLANTS,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a United States Commerce Court.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company, petitioners.
vs.
THE INTERSTATE COMMERCE COMMISSION, RESPONDENT; THE United States, The Pacific Coast Jobbers & Manufacturers Association, and The Associated Jobbers of Los Angeles, intervening respondents. } No. 2.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that on the first day of June, 1910, came the petitioners in the above-entitled cause, by their solicitors, and filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, their certain bill of complaint and exhibits, in the words and figures following, to wit:

Bill of complaint and exhibits.

1 In the Circuit Court of the United States within and for the District of Kansas, first division.

THE ATCHISON, TOPEKA AND SANTA FE Railway Company; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company, complainants.
vs.
THE INTERSTATE COMMERCE COMMISSION, defendant. } In Equity. No. 8887.

Bill of complaint.

Robert Dunlap, T. J. Norton, F. C. Dillard, W. R. Kelly, C. W. Durbrow, P. F. Dunne, solicitors for complainants. Gardiner Lathrop, W. F. Herrin, of counsel.

2 In the Circuit Court of the United States within and for the District of Kansas, first division.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company, complainants.
vs.
THE INTERSTATE COMMERCE COMMISSION, DEFENDANT. } In Equity.

To the honorable judges of the Circuit Court of the United States within and for the District of Kansas:

The Atchison, Topeka and Santa Fe Railway Company, a corporation, organized under the laws of the State of Kansas, Southern

Pacific Company, a corporation, organized under the laws of the State of Kentucky, and San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation, organized under the laws of the State of Utah, bring this their bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of Congress of the United States. And thereupon your orators complain and say:

That The Atchison, Topeka and Santa Fe Railway Company is and for a number of years last past has been a corporation duly organized and existing under the laws of the State of Kansas, and has and has had its principal operating office in the city of Topeka, in
3 the district of Kansas; that it is now and for a number of years last past has been operating lines of railroad from points in the States of Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, Texas, and the Territories of New Mexico and Arizona, to and into the city of Los Angeles in the State of California, and with lines extending to other points in said State, and is and has been engaged in the transportation of freight and passengers between various points on its said lines of railroad; that the line of railroad now operated by it extending from Barstow to Los Angeles and San Diego in said State of California was formerly owned and operated for some years by its predecessor in interest, the Southern California Railway Company.

That the Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and is now and for a number of years last past has been engaged in operating a line of railroad in connection with other railroads extending from El Paso, Texas, through the Territories of New Mexico and Arizona, and through the State of California, to the city of Los Angeles; and also lines of railroad extending from said city of Los Angeles by way of San Francisco and other points in the State of California to Salt Lake City, Utah, and is and has been engaged in the transportation of persons and property upon and over its said lines of railroad; that such lines extending into and out of the city of Los Angeles were formerly owned and operated for a number of years by the Southern Pacific Railroad Company, its predecessor in interest, and the line extending from San Francisco to Salt Lake City was originally owned and operated by the Central Pacific Railroad Company.

4 That the San Pedro, Los Angeles & Salt Lake Railroad Company is a corporation duly organized under the laws of the State of Utah, and owns and operates and for some years last past has owned and operated a line of railroad extending from San Pedro in the State of California into and through the city of Los Angeles and through various other towns in the State of California, through the State of Nevada and the State of Utah to Salt Lake City, and is and has been engaged in the transportation of persons and property upon and over its said lines of railroad.

That at all times each of said complainants and their respective predecessors in interest have maintained and do now maintain their

respective public freight depot buildings theretofore respectively established by each of them in said city of Los Angeles upon or adjacent to their respective tracks connecting with their respective main tracks in said city where freight in less than carload lots is and has been received for transportation from shippers in said city destined to various points upon their respective lines of railroad or points upon connecting lines of railroad in the United States, and where such freight transported from various points to Los Angeles is delivered to the owners or consignees thereof.

That each of said complainants and their respective predecessors in interest have also located and established and have maintained and do now maintain what are known as "team tracks" and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in general for the loading therein of carload freight by respec-
5 tive shippers in said city destined for transportation to various points upon their respective lines or to points on connecting lines of railroad in the United States; and where also is set and placed for the unloading thereof by consignees or owners in said city who have not been favored with the private or special side-track facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere, to such owners or consignees in said city of Los Angeles; and said teaming tracks and freight sheds of said respective companies are so connected with the respective main-line tracks of the respective complainants in said city that cars loaded with carload freight may be readily transferred from said main-line tracks to said teaming tracks and sheds; and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said teaming tracks and freight sheds constitute and have constituted the places where the respective complainants receive and have heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of Los Angeles; and the same are and have been in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds and buildings above shown constitute the places established as depots or stations by each of the complainants respectively in said city of Los Angeles for the receipt, handling and delivery of carload and less than carload freight intrastate and interstate. Said facilities so established and
6 maintained for the receipt, handling and delivery of less than carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or at any date can be tendered. The freight sheds and team tracks established and maintained for receipt, handling, and delivery of carload freight are sufficient to handle all the carload freight com-

ing into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of carloads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all of said carload freight can be received, handled, and delivered. In addition to this each of complainants has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team tracks; so that there is no necessity in the proper conduct of complainants' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of cartage which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth; and

7 in the investigation had by the Interstate Commerce Commission hereinafter referred to the undisputed evidence fully established the facts herein alleged.

Your orators further aver that each of them, as well as their respective predecessors in interest, have heretofore severally or individually entered into contracts or agreements with certain individual shippers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of spur tracks from the respective plant or industry in said city to and connecting with the yard tracks of the respective complainant in said city where trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company, and a part by such shipper. But such tracks were constructed especially to accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective complainant, carload freight consigned to or shipped by the owner or operator of said plant and therefrom, and thus the owner or operator of such plant or industry located upon such spur or side track was relieved from the necessity of transferring carload freight to and from said team tracks and from and to such plant or industry by dray or cart or wagon at a higher cost and greater risk; and in being accorded such side track facility the shipper at such industry or plant was given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks.

8 That in such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the rail-

way company would construct and maintain for a limited number of years (usually less than five) a spur track to connect such plant or industry with the railroad of the railway company. But in such contracts it was generally provided that while the railway company might make use of the proposed track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such plant or industry, but that traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

Your orators further aver that in the contracts made by the Southern Pacific Company covering the construction and maintenance of such industrial or spur tracks it was generally provided, among other things, as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

9 "5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

That contracts made for such purposes by the Atchison, Topeka and Santa Fe Railway Company contained, among other things, the following provision:

"The title of said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the rail-

way company shall have the right to remove said track and every part thereof."

That the contracts made by the San Pedro, Los Angeles & Salt Lake Railroad Company covering the construction and maintenance of such spur or industrial tracks contained provisions somewhat similar to those of the Southern Pacific Company above set forth.

Your orators further aver that industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the Atchison, Topeka and Santa Fe Railway Company, or its predecessor in interest, in said city of Los Angeles, are distant from its main track in said city anywhere
10 from 1/5 mile to 3½ miles, and that in order to receive a carload of freight from such plant or industry it will be, as it has been, necessary to switch from the main track or yards of the respective complainant an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination: that where a carload of freight is consigned to the operator of such plant or industry it is, and has been, necessary to switch the same from the yards of said respective complainant over said spur to the industry or plant in question and to place the same convenient thereat for unloading, and, in many instances, the empty car is required to be switched or transferred in being returned from such plant to the general yards of complainant.

Your orators further aver that industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the Southern Pacific Company, or its predecessor in interest, in said city of Los Angeles are distant from its main track in said city anywhere from 200 feet to 7 miles, and that in order to receive a carload of freight from such plant or industry it will be, as it has been, necessary to switch from the main track or yards of the respective complainant an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination: that where a carload of freight is consigned to the operator of such plant or industry
11 it is, and has been, necessary to switch the same from the yards of said complainant over said spur to the industry or plant in question and to place the same convenient thereat for unloading, and, in many instances, the empty car is required to be switched or transferred in being returned from such plant to the general yards of complainant.

Your orators further aver that industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the San Pedro, Los Angeles & Salt Lake Railroad Company in said city of Los Angeles are distant from its main track in said city anywhere from ⅓ mile to 4 miles, and that in

order to receive a carload of freight from such plant or industry it will be, as it has been, necessary to switch from the main track or yards of the respective complainant an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; that where a carload of freight is consigned to the operator of such plant or industry it is, and has been, necessary to switch the same from the yards of said complainant over said spur to the industry or plant in question and to place the same convenient thereat for unloading, and, in many instances, the empty car is required to be switched or transferred in being returned from such plant to the general yards of complainant.

Your orators further aver that in such contracts governing the construction and maintenance of such industrial tracks no
12 specific sum was fixed or prescribed in case the railway company should perform the aforesaid special service of receiving or delivering freight at the plant or industry in question, but at the time of executing such contract the usual charge separately and specially set forth in the respective tariffs of respective complainants for making such special deliveries, or such special receipt of carload freight involving the switching service to and from such plant or industry from and to the yards of respective complainant where trains are made or broken up, had been generally established by each of your orators at the sum or price of $2.50 per car, and had for many years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angeles would be made, and such charge of $2.50 has generally been made, maintained, and collected from said shippers in Los Angeles for said special service as aforesaid.

And your orators further aver that at the investigation or hearing before the Interstate Commerce Commission hereinafter referred to the above facts were fully established by the undisputed evidence.

Your orators further aver that the aforesaid service heretofore rendered by the respective railway companies of receiving carload freight at said industries or delivering the same to such industries or plants instead of at the team tracks or sheds is of great value to the owners or operators of such industries or plants and is
13 worth much more than the sum of $2.50 per car, inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have thus been favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are

greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into. Your orators further aver that at the hearing before the Interstate Commerce Commission, hereinafter more particularly mentioned, it was admitted of record by the shippers that the said charge of $2.50 is reasonable for the service performed; and it appeared during said hearing that the general or prevailing charge for drayage in Los Angeles is 50 cents a ton, which makes the cost to the consignee $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed by these complainants for delivering the consignment to or receiving the shipment at the door of the consignee's or shipper's warehouse; in addition to which money saving the shipment escapes the frequent handling necessitated by cartage and the exposure to storm and theft.

Your orators further aver that in performing said special switching service involved in the receipt and delivery of carload freight at such industry or plant it is put to a much greater expense than
14 if such freight were received or delivered on its teaming tracks or at its freight sheds.

Your orators further aver that each of them has made and established its rates of transportation to and from said city of Los Angeles from and to such points on their respective lines, and, in many instances, joint rates from and to points on many other railroads in the United States; that they have duly published and filed with the Interstate Commerce Commission and posted in their respective stations where freight is received, their respective schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less than carload freight and for carload freight; and that in respect to less than carload freight the rates have been established and made to cover the receipt or delivery of such freight at the freight station of the respective railway company in said city; and in respect to carload freight the rates established for the public in general contemplate receipt or delivery thereof upon or at the team tracks or sheds of the respective railway company; that in said tariffs it has been and is distinctly and separately provided and stated that where carload freight is received at or delivered to private industries located upon such industry tracks in said city of Los Angeles, an additional charge, i. e., a charge in addition to the rate fixed to and from Los Angeles, amounting to $2.50 per car, will be charged and collected for said special service of making special delivery or receipt of carload freight to or at said plants or industries located in said city of Los Angeles upon such special-industry tracks.

15 Your orators further aver that on account of water and other competition the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that complainants do not receive for such transportation sums which they are

justly entitled to and which they would otherwise be able to charge and collect; and, therefore, your orators ought not to be required or forced to perform the aforesaid special service of receiving or delivering goods at or to certain private industries in said city without reasonable reward and compensation for such special service.

On the contrary your orators aver that they are not legally obliged to receive or deliver carload freight at any other place in said city than upon their team tracks or at their freight sheds where carload freight is delivered to or received from the public in general, and that, therefore, when they voluntarily undertake for said favored shippers to receive or deliver carload freight at points on other tracks or at other points in said city they have the lawful right to make an additional and separate charge for the rendition of such special service at least equal to or commensurate with the value of such service.

Yet your orators state that notwithstanding the premises certain of said shippers so favored as aforesaid under such special arrangements by which they have been heretofore enabled to deliver their freight or receive the same at the doors of their respective plants or industries, conspired, combined, and confederated together to complain of said charge of $2.50 as being unauthorized and illegal under the interstate commerce law, and to repudiate the conditions and the special rate for the special service and favors heretofore
16 granted to them, and filed on or about the 27th day of August, 1908, a complaint in the name of the Associated Jobbers of Los Angeles before the Interstate Commerce Commission and against your orators in a proceeding numbered 1704. A true copy of said complaint is hereto attached, marked "Exhibit A" and made a part hereof.

In due time your orators respectively answered said complaint before said commission. A copy of the answer made by the Atchison, Topeka and Santa Fe Railway Company is hereto attached, marked "Exhibit B" and made a part hereof.

A copy of the answer of the Southern Pacific Company is hereto attached, marked "Exhibit C" and made a part hereof; and a copy of the answer of the San Pedro, Los Angeles & Salt Lake Railroad Company is hereto attached, marked "Exhibit D" and made a part hereof.

Thereafter said Interstate Commerce Commission proceeded to hear said complaint and took testimony in respect thereto. Thereafter on or about April 5, 1910, said commission filed their report in respect to said complaint wherein and by which report it appeared that a majority of the said commission held and decided that it was unlawful and illegal for complainants or either of them to make or establish or set forth in their respective tariffs in addition to the scheduled rates to and from Los Angeles, a separate charge for the aforesaid special service of receiving or delivering carload freight at the respective plants or industries located upon the aforesaid industrial tracks in said city of Los Angeles. For the information

of the court your orators attach hereto a copy of the said report and opinion of the respective Interstate Commerce Commissioners, marked "Exhibit E."

17 Thereupon, in pursuance of the aforesaid decision, said commission made their order upon said complaint ordering and directing your orators, defendants therein, from and after the first day of July, 1910, and for a period of two years thereafter, to desist from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits in said city of Los Angeles when such carload freight is moving in interstate commerce incidentally to a system-line haul; and for the same period to desist from exacting any charge whatever other than the charge for transportation from points of origin to destination for delivering or receiving carload freight to or from industries located upon spurs or side tracks within their respective switching limits in the said city of Los Angeles when such carload freight is moving in interstate commerce incidentally to a system-line haul.

The aforesaid order so made and entered by the said commission, is as follows, to-wit:

"1704.

"ASSOCIATED JOBBERS OF LOS ANGELES

v.

"THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company.

"This case being at issue on complaint and answered on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having

18 found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs

and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

A certified copy of the aforesaid report and order of the said commission was duly mailed by the secretary thereof to each of your orators and duly received by them on or about the 9th day of May, 1910.

But your orators aver that the aforesaid order of said com-
19 mission is unauthorized and erroneous and was made under a misconception of the law; that said order is unjust and unreasonable and deprives your orators of reasonable and just compensation for the rendition of services which they are not obliged under the law to perform; that the aforesaid order is based upon a misconception of the facts, and that an enforcement of the same will give to the owners of industries located upon said industrial tracks a greater and more decided advantage over other shippers in Los Angeles than is even now possessed by them, and will subject such other shippers to a greater disadvantage than they have been heretofore laboring under; also that said order deprives your orators of just or indeed any compensation for the said special services so rendered by them respectively, involving as it does the use of respective complainant's equipment and property, and deprives your orators of their property without due process of law, and is violative of the fifth amendment to the Constitution of the United States, as well as being beyond the power and authority of said Interstate Commerce Commission to make.

Your orators further aver that, if said order of said defendant, the Interstate Commerce Commission, should become effective and go into effect and be enforced, it would compel your orators to perform the aforesaid special service of switching cars to and from said special industries or plants in Los Angeles without reasonable or indeed any compensation therefor; that the number of cars so switched is quite large during each year and if said order of said defendant, the Interstate Commerce Commission, is allowed to remain and to become and be effective and enforced, the same will entail upon
20 your orators a loss of more than $200,000 per year, which loss will be absolute and complete to your orators.

Your orators further aver that if said order of said defendant, the Interstate Commerce Commission, is allowed to become and be effec-

tive very many suits for penalties will be brought against each one of your orators by many persons interested in said order and its enforcement and claiming to be injured by the acts of your orators unless said order is obeyed, which said suits will be brought and prosecuted as aforesaid by very many persons in many of the judicial districts of the United States against each of your orators, whereby your orators and each of them will be subjected to a great multiplicity of suits and great loss and damage will be inflicted upon your orators and each of them, all of which acts and doings will greatly injure and embarrass your orators and each of them in the transactions of their business.

Your orators further aver that notwithstanding the facts aforesaid the said defendants, the Interstate Commerce Commission, maintains and intends to maintain, and will, unless the same is enjoined or suspended by the order of this honorable court, maintain the said order as an effective order and institute, or suffer to be instituted, the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators.

Your orators, therefore, pray that upon the filing of this bill a temporary or interlocutory order be entered herein suspending the said order of the said Interstate Commerce Commission and restraining the enforcement of said order of the said commission and
21 restraining the said commission from taking any steps or instituting any proceedings to enforce the said order, and that upon a final hearing of this cause a decree be entered herein setting aside and annulling the said order of the said Interstate Commerce Commission and perpetually enjoining the enforcement of the said order and perpetually enjoining the said defendant and its members, their agents, servants, and representatives from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement of the said order.

Your orators further pray that, if any delay intervenes between the filing of this bill and the issuance of a temporary or interlocutory order, as prayed for herein, an order be issued herein suspending the said order of the said Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

And your orators further pray that such other and further relief be granted in the premises as justice and equity may require.

Your orators further pray that your honors grant unto your orators a writ of subpœna of the United States of America, directed to the said Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then and there full, true, and complete answer make to all and singular the premises; but not under oath (an answer under oath being hereby

expressly waived) and to stand to and abide such order and
22 decree herein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray, etc.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By F. B. HOUGHTON, *Its Freight Traffic Manager.*
SOUTHERN PACIFIC COMPANY,
By J. C. STUBBS, *Its Vice President and Director of Traffic.*
County of Cook, ss:
SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
By T. M. SLOAN, *Its General Freight Agent.*

ROBERT DUNLAP,
T. J. NORTON,
F. C. DILLARD,
W. R. KELLY,
C. W. DURBROW,
P. F. DUNNE,
Solicitors for Complainants.

GARDINER LATHROP,
W. F. HERRIN,
Of Counsel.

23 STATE OF ILLINOIS,
County of Cook, ss:

F. B. Houghton, being first duly sworn according to law, deposes and says that he is the freight traffic manager of the Atchison, Topeka and Santa Fe Railway Company, one of the complainants in the above entitled cause; that he knows the facts stated in the above and foregoing bill of complaint and that the statements therein are true.

F. B. HOUGHTON.

Subscribed and sworn to before me this 27th day of May, A. D. 1910.

[SEAL.] JOHN A. McDONALD,
Notary Public.

My commission expires November 15, 1913.

24 STATE OF ILLINOIS, *County of Cook, ss:*

J. C. Stubbs, being first duly sworn according to law, deposes and says that he is the vice president and director of traffic of the Southern Pacific Company, one of the complainants in the above-entitled cause; that he knows the facts stated in the above and foregoing bill of complaint and that the statements therein are true.

J. C. STUBBS.

Subscribed and sworn to before me this 27th day of May, A. D. 1910.

[SEAL.] JOHN A. McDONALD,
Notary Public.

My commission expires Nov. 15, 1913.

25 STATE OF ILLINOIS, *County of Cook*, *ss:*

T. M. Sloan, being first duly sworn according to law, deposes and says that he is the general freight agent of the San Pedro, Los Angeles and Salt Lake Railroad Company, one of the complainants in the above-entitled cause; that he knows the facts stated in the above and foregoing bill of complaint and that the statements therein are true.

T. M. SLOAN.

Subscribed and sworn to before me this 27th day of May, A. D. 1910.

[SEAL.] JOHN A. McDONALD,
Notary Public.

My commission expires Nov. 15, 1913.

26 Exhibit A.

Before the Interstate Commerce Commission.

ASSOCIATED JOBBERS OF LOS ANGELES, COMPLAINANT, *vs.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation; Southern Pacific Company, a corporation; and San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, defendants.	Complaint.

In re Switching Charges at Los Angeles, California.

The petition of the above-named complainant respectfully shows:

First.

I.

That complainant is a voluntary association of indi*di*viduals, firms, and corporations, organized for the promotion and defense of the jobbing and manufacturing interests in and around the city of Los Angeles, State of California; that said association comprises in its membership a large number of representative persons, firms, and corporations who are engaged in wholesale business or in manufacturing, or in both wholesale business and manufacturing, who have their principal business locations in the city of Los Angeles aforesaid,

27 and who are engaged and interested in the transportation of merchandise and commodities from points outside of the State of California to the said city of Los Angeles and also from said city of Los Angeles to points outside of California; that its principal office is at room 508, Equitable Building, in the city of Los Angeles, State of California.

II.

That the defendant above named, Atchison, Topeka and Santa Fe Railway Company, is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Kansas; that the defendant above named, Southern Pacific Company, is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Kentucky; that the *the* defendant above named, San Pedro, Los Angeles and Salt Lake Railroad Company, is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Utah.

III.

That each of the said defendants during all the times in this bill of complaint referred to was and still is a public-service corporation and a common carrier engaged in the transportation of passengers and property wholly by railroad, and also engaged in the transportation of passengers and property by railroad and partly by water under a common control, management, and arrangement for a continuous carriage or shipment from points in the United States without the boundaries of the State of California to points in the State of California, and also from points in the State of California
28 to points in the United States without the boundaries of the State of California, and as such common carrier each of said defendants is subject to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and all acts amendatory thereof or supplementary thereto.

IV.

That the members of this complainant association, as well as other merchants and manufacturers of Los Angeles, on whose behalf this complaint is filed, are large importers and exporters of interstate freight, and that the larger part of the freight carried between Los Angeles and other points in the United States and without the boundaries of the State of California is carried by the defendants herein.

V.

That for the purpose of receiving and delivering interstate freight carried over their lines between said city of Los Angeles and points without the boundaries of the State of California, said defendants, and each of them, have established terminal freight yards in said city of Los Angeles; said terminal freight yards are extensive in area and comprise within their limits large tracts of land owned or held under lease by said defendants, respectively, and also rights of way for laying tracks, operating locomotives, and transporting freight

cars and trains over and across public streets in said city of Los Angeles, granted to said defendants, respectively, by the public authorities of said city of Los Angeles. That at the instance
29 and request of the respective defendants, many Los Angeles merchants and manufacturers, members of this complainant association, and other Los Angeles merchants and manufacturers, in whose behalf also this petition is presented, have procured business locations immediately adjoining, or within short distances of said terminal freight yards of said defendants, and have erected upon said locations large places of business and warehouses; all of said places of business and warehouses being within the respective switching or yard limits of defendants, and in many cases upon land owned by the respective defendants and leased by them to such merchants and manufacturers, and the respective defendants, under a contract and arrangement with said merchants and manufacturers, have constructed short spur tracks or industry tracks leading from said warehouses and places of business to and connecting with the tracks of said defendants, respectively, running in and about said terminal freight yards.

That the said contracts and arrangements under which said industry tracks have been constructed provide that the respective merchant or manufacturer making such contract shall furnish free of cost to the defendant making such contract, the right of way for said spur track, except so much of said right of way as is owned by such defendant at the time of making such contract (for the use of which part of said right of way owned by such defendant, such merchant or manufacturer must pay to such defendant as rental a sum specified in the contract); that such defendant shall have the right, free from any cost or charge whatsoever, to enter upon, construct, and maintain such spur track upon such right of way during the term of such contract; that such merchant or manufacturer will pay
30 to such defendant before said spur track is constructed, the entire cost and expense of the construction of said spur track, and will thereafter pay the entire cost and expense of the maintenance of said spur track; that such merchant or manufacturer will operate the plant to be served by such industry track during the term of such contract; that he will during that time route and transport all shipments of goods, wares, merchandise, articles, and products to and from said plant, or shipments in respect to the business of the said plant carried on thereat, the shipment and routing whereof may be controlled by the second party over the railroad of the first party and connecting railway lines selected by it whenever the points to or from which such shipments are to be made may be reached by such railroad and connecting lines, and the rates offered by the first party for such transportation shall not be greater than rates in published tariffs of other railroad companies reaching the points between which such shipment is to be made and applicable thereto; that he will at all times give preference to such defendant in respect to the routing of business or shipments to be made by such merchant or manufacturer

from such plant; that the title to such spur track and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by such defendant in the maintenance of such spur track, shall at all times be and remain in such defendant; and that such defendant may use such spur track for other purposes than the delivery of freight to or the receipt of freight from the merchant or manufacturer making the contract, provided that such use shall not interfere with the conduct of
31 the business of such merchant or manufacturer, such contract further providing that at any time after its termination such defendant shall have the right to remove said track and every part thereof.

That the title to said industry tracks when constructed, and of any privilege, grant, or franchise from the city of Los Angeles required in order to authorize their construction or maintenance, is entirely in said defendants, respectively, and said merchants and manufacturers have no title whatsoever therein, nor have they any right to use or operate the same; that said industry tracks, when constructed under and pursuant to the agreement required from said defendants, respectively, from such merchants and manufacturers, become and constitute part of the trackage of the respective defendants and part of the receiving and delivering system of such defendants for all interstate freight received at or carried from the said city of Los Angeles, and that in all cases as aforesaid said industry tracks, to all intents and purposes, are owned and controlled by said defendants, respectively, and are frequently used by the respective defendants for other purposes than the delivery of freight to, or the receipt of freight from, the merchants or manufacturers, parties to said contract; that said contracts make no provision for the payment by such merchants or manufacturers of any charge whatsoever, such as the switching charge hereinafter referred to.

That the construction, operation, and maintenance of said industry tracks as aforesaid are of great value and assistance to said defendants, and that without such industry tracks said companies and each of them would be unable to provide proper facilities for the reception and distribution of interstate freight at Los Angeles,
32 and would be unable to transact the business of the receipt and delivery of such freight at said place, or would be greatly hampered or hindered therein to the resultant injury of the defendants and of the entire community of Los Angeles; that if said industry tracks at Los Angeles were entirely discontinued and removed said defendant companies would be compelled to greatly extend the limits of their respective terminal facilities and freight yards, in order to properly receive and discharge interstate freight at Los Angeles; that in many instances where industries have been located upon land owned by one of said defendants as aforesaid, such defendant has fixed the rental for said land at a low figure in order to induce shippers to locate near its tracks and to make shipments of freight over lines owned by such defendant.

VI.

That defendants maintain and publish schedules, or tariffs, known as Transcontinental Freight Bureau Westbound Tariffs No. 1–G, I. C. C. No. 375, and supplements thereto, applying on interstate freight originating at Colorado common points, Missouri River common points and points east thereof, and destined to Pacific coast terminals and points intermediate, and Transcontinental Freight Eastbound Tariff No. 3–E, I. C. C. No. 318, and supplements thereto, applying on interstate freight originating at Pacific coast terminals and destined to Colorado common points, Missouri River common points and points east thereof, and points intermediate, and also numerous other tariffs applying on interstate freight to and from said Pacific coast terminals, and that said city of Los Angeles is one of said Pacific coast terminals.

33 That it is the duty of defendants and each of them as common carriers to receive and to deliver interstate freight at their respective terminals, without further or other charge beyond the freight rate applying at such points, duly established and published according to law, but that, nevertheless, said defendants and each of them enforce, charge, and collect and retain to their own use, without division with connecting carriers, a separate and distinct charge in addition to such freight rate, and known as a "switching charge" for the receipt and delivery of interstate carload freight received or delivered upon said industry tracks at Los Angeles, in the sum of $2.50 per car, on both incoming and outgoing cars, said switching charges herein referred to being found, respectively:

In amendment No. 9 to "Santa Fe system" tariff No. 8117–A, I. C. C. No. 4281, item 305, applying at Los Angeles, California, "between all points located within Los Angeles switching limits, including transfer tracks of connecting lines, and industries, warehouses, or private side tracks located within Los Angeles switching limits, freight, carloads (when incident to line haul, 'system' or foreign), $2.50 per car."

In Southern Pacific terminal tariff No. 230–C, I. C. C. No. 3011, item 33, applying at Los Angeles, Cal., "between depot and industry tracks and private sidings within switching limits, as defined in item 100 on page 15 of this tariff, including team tracks at Vernondale, Nadeau Park, Winthrop, Grand Ave., University, Aurant, and Maier, Cal.," on "freight, carloads, when incident to a line haul, rate per car * * * $2.50."

34 In San Pedro, Los Angeles and Salt Lake Railroad Company's terminal tariff No. 200, I. C. C. No. 228, item 42, applying at Los Angeles, California, "between San Pedro, Los Angeles and Salt Lake Railroad freight yards, or the transfer tracks or connecting lines and industries, warehouses, or private side tracks within yard limits, freight, carloads (when incident to line haul, local or foreign), $2.50 per car."

The industry tracks herein referred to are located within the switching or yard limits of defendants referred to in said tariffs, respectively.

That immediately in the neighborhood of said industry tracks are located so called "team tracks" upon which free deliveries and receipts of interstate carload freight are made and taken by said defendants, and each of them, without any switching charge whatsoever; that such free deliveries and receipts are made and taken within the switching or yard limits of said city of Los Angeles and within short distances from the plants where said industry track deliveries and receipts are made and taken, and that the cost of such switching service on said industry tracks does not exceed the cost of service on said team tracks, or the cost of such service in the other cities herein referred to, where no such switching charge is made.

That in other cities of the United States similar in size and condition to Los Angeles, such as Portland, Seattle, Tacoma, Ogden, Salt Lake, El Paso, Denver, Omaha, Kansas City, St. Paul, Minneapolis, Chicago, St. Louis, Cleveland, Pittsburg, and others, it is the usage and custom of common carriers of interstate freight to receive and deliver carloads of interstate freight upon such adjoining industry tracks free of any switching or extra charge and for one freight charge from point of origin to point of destination.

35 That the defendants herein for many years past have made no extra or any charge for the receipt or delivery of carloads of interstate freight upon industry tracks at Stockton, Richmond, Oakland, or Sacramento, all in California; that said last-named points are "Pacific coast terminals," as defined in Transcontinental Freight Bureau West-bound Tariff No. 1–G, I. C. C. No. 375 and Transcontinental Freight Bureau East-bound Tariff No. 3–E, I. C. C. No. 318, and said points are subject to the same rates as Los Angeles on east and west bound interstate shipments; that at many other points in the State of California, among others, Fresno, Hanford, Visalia, Bakersfield, San Bernardino, Pasadena, and Colton, free deliveries and receipts of interstate freight are made and taken by said defendants and each of them upon industry tracks and side tracks.

VIII.

That the cities of Oakland, Stockton, and Sacramento are in the State of California and are Pacific coast terminals and take the same freight rates as the city of Los Angeles on interstate west-bound freight originating at Colorado common points, Missouri River common points and points east thereof, and also are subject to the same rates for freight as Los Angeles on east-bound interstate freight carried by defendants, or any of them, and destined to points east of California: that in each and all of said cities, and also in the cities of Fresno, Hanford, Visalia, Bakersfield, San Bernardino, Pasadena, and Colton and intermediate points, subject in many cases to the same freight rates as Los Angeles, are located individuals, firms,

36 and corporations who are competitors of said Los Angeles merchants and manufacturers in the distribution and sale of such freight, and said Los Angeles merchants and manufacturers also meet with competition at said points from individuals, firms, and corporations located at Colorado common points, Missouri River common points, and points east thereof, as defined by said Tariff No. 1-G, I. C. C. No. 375 and supplements, and by the other tariffs herein referred to. That in all said cities, industry tracks similar to those existing in Los Angeles are constructed and maintained under and pursuant to similar contracts and are used by such competing merchants and manufacturers and defendants render such switching service to such competing merchants and manufacturers without any extra charge whatsoever.

IX.

That the city of San Jose is one of said Pacific coast terminals and takes the same rates as Los Angeles on east-bound interstate freight moving under rates named in Transcontinental Freight Bureau East-bound Tariff No. 3-E, I. C. C. No. 318, and supplements thereto; that said freight when carried by defendant Atchison, Topeka and Santa Fe Railway Company, is delivered to said company by defendant Southern Pacific Company, under a joint arrangement for a continuous carriage or shipment.

That there are located in San Jose, California, merchants and manufacturers who have industry tracks connecting with the lines of defendant Southern Pacific Company, and who are competitors of said Los Angeles merchants and manufacturers in the distribu-
37 tion and sale of freight moving east-bound under rates named in said tariff No. 3-E.

That said Southern Pacific Company provides in its said Terminal Tariff No. 230-C, item 74 thereof, that switching charges at San Jose between depot and industry tracks and private sidings within switching limits, as defined in item 103, on page 15 of said tariff, will be waived on shipments moving east-bound under rates named in Transcontinental Freight Bureau East-bound Tariff No. 3-E, I. C. C. No. 318, supplements thereto or reissues thereof; that no such provision is made with respect to switching charges imposed at Los Angeles.

X.

That in many instances in the past, in the said city of Los Angeles, free industry track receipts and deliveries have been in force, and in other instances a charge as low as $1.25 per car has been imposed and collected in said city, circumstances and conditions at such times being substantially similar to the circumstances and conditions now prevailing in said city.

XI.

That the switching services rendered and which will hereafter be rendered to the merchants and manufacturers of Los Angeles by defendants in the transportation of interstate freight over said private industry tracks, have been and will continue to be like in kind to, and contemporaneous with the services rendered and to be rendered to the merchants and manufacturers of other cities who are herein alleged to be in competition with said merchants and manu-
38 facturers of Los Angeles, in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

XII.

That the cost to defendants, respectively, of performing said switching service, has been taken into account by the respective defendants in fixing freight rates as published in the tariffs hereinbefore referred to; that the said freight rates are by reason thereof, greater than they would or should be were such allowances for the cost of performing such services not made.

Second.

I.

That compensation for the services of receiving and delivering interstate freight over and upon said industry tracks in the city of Los Angeles being already included in the line haul rates or freight rates as set forth in the tariffs herein referred to, and compensation for such services being paid together with and as a part of said line haul or freight rates, the imposition or collection by defendants, or any of them, of any further compensation for such services, or the making of any further charge therefor, and particularly the switching charge herein specifically complained of, is unlawful, unreasonable, unjust, and void, and in violation of said act to regulate commerce, and particularly of section one thereof.

II.

That defendant being under no additional expense by reason
39 of the rendering of such switching services in receiving and delivering said interstate freight over and upon said industry tracks, the imposition and collection of any charge for such services is unreasonable, unjust, and unlawful, and said switching charge of $2.50 per car is excessive, unreasonable, unjust, and unlawful, and in violation of said act to regulate commerce, and particularly of section one thereof.

III.

That the imposition and collection of said switching charge, or of any charge for such services, is an unjust discrimination against the said merchants and manufacturers of Los Angeles, and an undue and unreasonable preference and advantage in favor of said competitive individuals, firms, and corporations in all of the other competitive cities named in this complaint, and is in violation of said act to regulate commerce, and particularly of sections two and three thereof.

Wherefore complainant prays that the defendants and each of them may be required to answer this complaint, and that after due hearing and investigation, this honorable commission declare said switching charge unreasonable, unjust, unlawful, excessive, discriminatory, and void, and that an order be made commanding the defendants, and each of them to cease and desist from said violations of said "Act to regulate commerce" approved February 4th, 1887, and acts amendatory thereof and supplementary thereto and from each violation of said act involved in this proceeding; to cease and desist from making the charges and collecting the unjust, unreasonable, excessive, exorbitant, discriminatory, and unlawful charges
40 complained of in this complaint, and from the enforcement of such unjust, unreasonable, and exorbitant tariffs; and if it shall be held that the defendants, or any of them, have the right to make some charge for the delivery or receipt of interstate freight over and upon said industry tracks at Los Angeles, in addition to the rate for the line haul, then and in that event that this honorable commission make an order fixing, establishing, and substituting in lieu and in place of said excessive, exorbitant, unjust, unlawful, and discriminatory rates and charges, reasonable rates for such industry track service at said Los Angeles; and that the defendants, and each of them, be duly ordered and required to conform to and obey such orders; and complainant further prays for such other and further orders and relief in the premises as to this honorable commission may seem necessary, just, and proper.

Dated at Los Angeles, Cal., this 19th day of August, 1908.

ASSOCIATED JOBBERS OF LOS ANGELES,
By M. H. NEWMARK, *President.*

JOSEPH P. LOEB and
EDWARD G. KUSTER,
Attorneys for complainant,
430 I. W. Hellman Building, 4th and Main Streets
Los Angeles, Cal.

41 STATE OF CALIFORNIA,
County of Los Angeles, ss:

M. H. Newmark, being duly sworn, says that he is the president of the Associated Jobbers of Los Angeles, complainant in this proceeding, and that he makes this verification of the foregoing complaint

for and in behalf of said association; that he has read the foregoing complaint and knows the contents thereof, and that the matters therein set forth are true to the best of his knowledge and belief.

M. H. NEWMARK.

Subscribed and sworn to before me this 19th day of August, 1908.

EDWIN J. LOEB,

[SEAL] *Notary Public in and for said County of Los Angeles, State of California.*

42 Exhibit B.

Before the Interstate Commerce Commission.

ASSOCIATED JOBBERS OF LOS ANGELES, COMPLAINANT,
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., defendants.
} Docket #1704.

Separate answer of the Atchison, Topeka and Santa Fe Railway Company.

And now comes the Atchison, Topeka and Santa Fe Railway Company, and for its separate answer to the complaint in the above entitled cause, respectfully states and shows:

It has no knowledge as to the nature of the business or the corporate character of said complainant, and therefore denies the allegations contained in Paragraph I of said complaint.

It admits that it is a Kansas corporation.

It admits that it is a common carrier over its own line of railroad.

It has no knowledge as to the particular business of complainants or the volume of same, and therefore it denies the allegations in Paragraph IV of said complaint.

Answering the other matters and things in said complaint, this defendant denies that said industry tracks or any of them ever became or constitute part of the trackage of this defendant, or part of the receiving or delivering system of this defendant; that on the contrary, said tracks were constructed and are maintained for
43 the use of the industries located thereon respectively; and said tracks may be used by this defendant only so far as such use does not interfere with the full use of said tracks in handling the business of the industries located thereon. It denies that said industry tracks are located within the yards or switching limits of this defendant's railroad in said city.

This defendant avers that the statements of complainant as to the provisions of defendant's contracts with industries, covering such spur tracks, are mere conclusions of said complainant; and this defendant denies all of such allegations and conclusions and requires that strict proof of the same be made.

This defendant denies that said industry tracks or any of them are of great or any value to this defendant, in the conduct of its business or otherwise, but, on the contrary, alleges that they are an item of expense to it and a source of constant risk and frequent loss to this defendant. And this defendant denies that without said tracks its business would be in any wise hampered, and affirms that without them this defendant's business would be greatly facilitated and more economically conducted. And this defendant denies that without such tracks it would be compelled greatly to increase its terminal facilities, but avers that the discontinuance of serving on said industry tracks would necessitate only a slight increase in team tracks, averring that one mile of team track will serve to handle as much freight as is handled on the average on ten miles of industry track.

This defendant admits its duty is to deliver freight at point of destination, but avers that it is always ready and willing and able to deliver on its own team tracks at point of destination, without
44 extra charge, and that any shipper desiring such delivery is given it without any charge for switching; that the charge for switching, which is the cause of complaint herein, is never made except for a service separate and distinct from the ordinary delivery of goods by a rail carrier at its own depot or team track, and is never made except at the special instance and request of the shipper. And this defendant denies that it is its duty to deliver freight without separate charge for delivery elsewhere than at its depot or on its team tracks designated for that purpose.

This defendant admits that some industry tracks are near free delivery tracks, but states that others are at considerable distance therefrom, and that to reach delivery points on industry tracks it frequently and generally necessitates pulling cars across or along city streets, all at no little risk and loss to defendant, and at great expense because of delays and of necessarily slow movement.

And this defendant denies that the imposition and collection by it of said additional and extra charges is unlawful, unreasonable, or unjust, or in violation of any law.

And, as a further defense, this defendant shows that it and its predecessors have been carrying freight in and out of Los Angeles only since about the year 1886; that long before this defendant or its predecessors entered said city, and, as this defendant is informed and believes, the charges herein complained of had been regularly made and paid by shippers at Los Angeles. That every one of said industry tracks connecting with the rails of this defendant was
45 constructed at the request, and in many cases at the expense, of the owner of the plant to be served by such track, and in every case with the full knowledge and understanding on the part of such owner that the charge herein complained of would be made for all cars handled by this defendant over such industry tracks for the plant served thereby.

This defendant further denies all other matters and things and conclusions of law set forth in said complaint.

It further avers that the circumstances and conditions surrounding the situation herein complained of are dissimilar and different from the circumstances and conditions set forth in Paragraph VII, VIII, and IX of said complaint. It denies the allegations contained in Paragraphs X and XI of said complaint.

This defendant further shows that its rates to and from Los Angeles are rates forced upon this defendant by reason of water competition existing at Los Angeles and San Francisco, and are very much less than this defendant might reasonably charge for the service rendered; that the rate and the switching charge herein complained of amount to much less than this defendant might reasonably charge for the service rendered; that whatever this defendant obtains for the carriage of freight in and out of Los Angeles is what it can charge and secure for business as against water competition, and is much less than it might reasonably charge for the service rendered.

It denies the allegations contained in Paragraph XIII of said complaint, that said general freight rates as aforesaid, as published,
are based upon and include the service of switching to and
46 from spur tracks of industries, as aforesaid; on the contrary,
it states that such freight rates would necessarily be higher if such switching service were included within the general tariff rates applicable to and from the general delivery tracks of this defendant.

Answering further the said complaint, this defendant denies that the charges complained of are too high, whether considered in connection with the cost of the services performed or otherwise; and this defendant denies that the cost of such service on said industry track does not exceed the cost of service on team tracks, where no charge is made, but shows, on the contrary, that the cost of service on the industry tracks is very greatly in excess of the cost of service on team tracks.

And further this defendant admits that delivery is made at Portland practically as in said paragraph set forth, but denies that such delivery results in any discrimination against Los Angeles or the shippers thereof; and denies that such charges constitute or result in an undue or unreasonable preference or advantage in favor of said Portland, or subjects said Los Angeles or its shippers to any undue or unreasonable prejudice or disadvantage. And on its information and belief this defendant shows that its codefendant, Southern Pacific Company, its compelled by competitive conditions of long standing at Portland to perform at that point free service similar to that charged for at Los Angeles, the charge for which constitutes the cause of complaint herein.

And further this defendant states that the circumstances and conditions surrounding the transportation of property to and from
47 Los Angeles, are dissimilar and different from the circumstances and conditions surrounding the transportation of property to and from Portland, Seattle, Tacoma, Ogden, Salt Lake, El Paso, Denver, Omaha, Kansas City, St. Paul, Minneapolis, Chicago, St. Louis, Cleveland, Pittsburg, Oakland, Stockton, Sacramento, San

Jose, Fresno, Hanford, Visalia, Bakersfield, San Bernardino, Pasadena, Colton, or any other city in said complaint mentioned.

Answering further the said complaint, this defendant denies that the imposition and collection of said switching charge at Los Angeles constitutes an unjust, unlawful, unreasonable or void charge or any unjust discrimination against said city or its shippers, or any undue or unreasonable preference or advantage in favor of said Sacramento, Oakland, Stockton, and Richmond, Portland, Seattle, Tacoma or other cities, or the shippers thereof, or subjects the city of Los Angeles or its shippers to unjust, unlawful, unreasonable or void charge, or to any unreasonable or undue prejudice or disadvantage, or unjust discrimination in violation of any law.

And as a further defense this defendant shows that it and its predecessors have been carrying freight in and out of Los Angeles only since about the year 1886; that long before this defendant or its predecessors entered said city, this defendant is informed and believes the charges herein complained of had been regularly made and paid by shippers at Los Angeles. That every one of said industry tracks connecting with the rails of this defendant was constructed at the request, and in many cases at the expense of the owner of the plant to be served by such track, and in every case with the
48 full knowledge and understanding on the part of such owner that the charge herein complained of would be made for all cars handled by this defendant over such industry tracks for the plant served thereby.

This defendant further shows that its rates to and from Los Angeles are forced upon this defendant by reason of water competition existing at San Francisco and Los Angeles, and are very much less than this defendant might reasonably charge for the services rendered; that the rate, together with the switching charge herein complained of, amount to much less than this defendant might reasonably charge for the service rendered. That whatever this defendant obtains for the carriage of freight in and out of Los Angeles is what it can charge and secure for business as against water competition, and is much less than it might reasonably charge for the services rendered.

And this defendant further denies that said switching charges so assessed are excessive, unjust, unreasonable, unlawful, void, or discriminatory as to this complainant in favor of other competitive shippers, consignees, traffic, or localities under similar circumstances and conditions.

This defendant denies that the said switching charge assessed and collected by it are unjust, excessive, unreasonable, unlawful, void, or discriminatory or that they constitute an unjust, undue, or unreasonable discrimination, prejudice or disadvantage against the city of Los Angeles, or its said shippers, consignees, merchants, manufacturers or traffic, to the favor, preference, or advantage of other competitive localities, shippers, consignees, merchants, or
49 manufacturers, or their traffic, under similar circumstances

and conditions; and this defendant denies generally as to the whole complaint and specially as to each and every allegation thereof, any and all alleged violations or violation of the act to regulate commerce or acts amendatory thereof or supplemental thereto.

Wherefore this defendant prays that the said complaint may be as to it, hence dismissed.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
(Signed) By ROBERT DUNLAP,
E. W. CAMP,
JAMES L. COLEMAN,
Its Attorneys.

CHICAGO, *September 14, 1908.*

50 Exhibit C.

Before the Interstate Commerce Commission.

ASSOCIATED JOBBERS OF LOS ANGELES, COMPLAINANT,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, defendants.
Docket No. 1704.
Answer.

Southern Pacific Company, for answer herein, respectfully shows:

I.

For want of sufficient information, it is unable to admit or deny specifically the matters contained in the first paragraph of the petition herein, and therefore leaves complainant to its proof in that behalf.

II.

Admits the allegations contained in Paragraph II of complainant's petition

III.

So far as Paragraph III of complainant's petition is concerned, this defendant says that it is a common carrier engaged in interstate traffic, passenger and freight, south of Portland, to points within the State of California, and west of Ogden, Mojave, and Rio
51 Grande, to points within California, and as such is subject to the provisions of the act to regulate commerce; and further than this makes no admission in respect to Paragraph III.

IV.

Upon the ground that it has not sufficient information or belief to enable it to answer specifically the allegation contained in Para-

graph IV of complainant's petition, with reference to complainant, or other merchants or manufacturers of Los Angeles, on whose behalf complainant's petition is filed, being large importers or exporters of interstate freight, it denies said allegation and puts complainant to its proofs thereof.

This defendant alleges that it carries freight between Los Angeles and the points specified in Paragraph III herein, and makes no further admissions in respect to Paragraph IV.

V.

As to Paragraph V, this defendant, for the purposes generally indicated in said paragraph, has established terminal freight yards in Los Angeles, of extensive area, and comprising large tracts of land owned or leased by this defendant, and rights of way, for trackage and operation and transportation over and across public streets in Los Angeles, granted by the public authorities; and many Los Angeles merchants and manufacturers have procured business locations adjoining and, in some instances, within short distances of these terminal freight yards, and have erected thereon warehouses and places of business, not in all cases at the instance and request of de-
52 fendant; nor is it accurate to say that it was exclusively at the instance and request of defendant, but it was also upon the judgment and in the interests of the several merchants and manufacturers; defendant admits that all of said places of business and warehouses having sidetrack facilities are within the switching or yard limits of defendant. Said warehouses are in many cases upon land owned by the defendant and leased by it to such merchants and manufacturers at Los Angeles.

It is for the fact that the defendant, under arrangements with said merchants and manufacturers, has constructed short spur tracks or industry tracks leading from warehouses and places of business to the tracks of defendant in and about the terminal freight yards. The title to the constructed industry tracks and to the privilege, grant, or franchise from the municipal authorities authorizing the construction, is in the defendant where the track is on its right of way, and, subject to some qualifications, is in the defendant when the tracks extends beyond and over the private realty of the merchant or manufacturer concerned.

It is true, as alleged in Paragraph V of complainant's petition, that the contracts and arrangements under which said spur or industry tracks have been constructed contain provisions substantially as recited by complainant in said Paragraph V of its petition, excepting that this defendant receives no rental for the use of said industry tracks, and that this defendant, in constructing said industry tracks at the request of said merchants and manufacturers, furnishes the rails, switches, switch-stands, frogs, and spikes without expense to the industry.

These industry tracks, when thus constructed, are part of the trackage of the defendant, and are part of the receiving and de-
53 livering system of the defendant for interstate freight received at or carried from the city of Los Angeles in the sense that they are physical extensions and parts of physical extensions from the main line; but they are not part of the trackage of this defendant in the sense that they are part of the receiving and delivering system of this defendant, and in fact they are constructed and maintained for the use and in the interest of the industries located thereon, and are open to use by defendant only so far as that use does not conflict with the full use of the trackage in the specific purpose of handling business thereon for the special and private benefit of the industries thereon located.

The construction, operation, and maintenance of these industry tracks are not of great or special value to this defendant in the conduct of its business, but have been a source of expense and risk to this defendant, and are of considerable value and assistance to the manufacturer or merchant served thereby.

It is not true that without these industry tracks defendant would be unable to provide proper facilities for the reception and distribution of interstate or other freight at Los Angeles, or would be at all unable to transact the business of the receipt and delivery of interstate freight at Los Angeles; nor is it true that in the absence of such tracks defendant would be at all hampered or hindered therein, or, for that matter, hampered or hindered at all in view of the availability of team tracks for purposes of receipt and delivery; nor is it true that the absence of such industry tracks would be to the resultant injury of defendant, or of the Los Angeles public at large, for the reasons assigned in said petition, for, while it is said there that the defendant would be compelled to extend very largely the limits
54 of its terminal facilities and freight yards in order to transact the business of receiving and delivering interstate freight at Los Angeles, it is not true that such facilities and yards would have to be increased greatly, or to any large extent, or at all, and it is the fact that deliveries can and could be made from team tracks to the persons now enjoying the benefits and advantages of these industry tracks.

VI.

It is true that this defendant maintains and publishes Transcontinental Freight Bureau West-Bound Tariff No. 1-G, I. C. C. No. 375 and supplements thereto, applying on interstate freight originating at Colorado common points, Missouri River common points, and east thereof, and destined to Pacific coast terminals and points intermediate; also Transcontinental Freight Bureau East-Bound Tariff No. 3-E, I. C. C. No. 318 and supplements thereto, applying on interstate freight originating at Pacific coast terminals and destined to Colorado common points, Missouri River common points, and points east

thereof; and also tariffs applying on interstate freight to and from said Pacific coast terminals.

It is true that it is the duty of defendant, as a common carrier, to receive and deliver interstate freight at its terminals without further or other charge beyond the freight rate applying at such points, duly published according to law, and further, it is the duty of defendant, as a common carrier, so to receive and deliver interstate freight without discrimination.

It is also true that this defendant collects and retains to its own use, without division with other carriers, a separate and dis-
55 tinct charge, known as a "switching charge" for the receipt and delivery of interstate carload freight received or delivered upon these industry tracks at Los Angeles, in the sum of $2.50 per car on incoming and outgoing cars. These switching services enjoyed by complainants, and which they are asking to have made free to them, are for a service separate and distinct from the ordinary delivery of goods by a rail carrier at its depot or team tracks, and it is not the duty of this defendant to render that particular and special service without separate charge therefor.

It is a fact that charges are made as per this company's Terminal Tariff No. 230–C, I. C. C. No. 3011, item 33, applying at Los Angeles, California, between depot and points therein specified; and it is admitted that the industry tracks herein referred to are located within the switching or yard limits of defendant referred to in said tariff.

It is true that in the neighborhood of the industry tracks, and conveniently accessible to the complainant, are located "team tracks," upon which free deliveries and receipts of interstate carload freight are made and taken by defendant without any switching charge whatever, such free deliveries and receipts being open to this complainant without discrimination, and it is true that such free deliveries and receipts are made and taken within the switching or yard limits of said city of Los Angeles, and, in some instances, within comparatively short distances from the plants where said industry track deliveries and receipts are made and taken. But defendant denies that the cost of such switching service on said industry tracks does not exceed the cost of service on said team tracks, or the cost of such service in the other cities referred to in complainant's peti-
56 tion; that, on the contrary, this defendant says that from said depot to said industry tracks a longer and more expensive haul is required than to said team tracks, including the necessity of hauling cars across and over city streets at considerable expense, risk, and loss of time.

VII.

In reference to the other cities of the United States mentioned in Paragraph VII of complainant's petition it is denied that the conditions are similar to those obtaining in Los Angeles; and further, the information of this defendant does not justify it in admitting the averment that the usage and custom of common carriers is to

receive and deliver carloads of interstate freight upon industry tracks free of switching or extra charge and for one freight charge from point of origin to point of destination; and in this behalf defendant puts the complainant upon its proof.

It is not true that this defendant has, or any time, made no extra or any charge for the receipt and delivery of carloads of interstate freight upon the industry tracks at Stockton, Richmond, Oakland, or Sacramento, California; and in this connection alleges that the following charges have been made by this defendant at the following specified points:

In respect to Oakland: On shipments between transfer track of the Atchison, Topeka & Santa Fe Railway Company, or the San Francisco, Oakland & San Jose Railway Company, and industry tracks and private siding located at Alameda, Alameda Point, Berkeley, East Oakland, Pacsteel, United Engineering Works, West
57 Alameda, West Berkeley, and intermediate points, on business on which this defendant receives no line haul, a charge of $2.50 for switching is made; on shipments switched from Oakland Station to or from the points last mentioned, on which this company gets a line haul, a switching charge of $2.50 per car is made; and on shipments between industry tracks and private sidings within the switching limits, which include the territory from West Berkeley and include Fruitvale to and including Park Street, Alameda, to and including West Oakland and the transfer track of the San Francisco, Oakland & San Jose Railway Company, or the Atchison, Topeka & Santa Fe Railway Company, on shipments originating at or destined to noncompetitive points on the said Atchison line, a rate of $2.50 per car is charged by defendant. Where defendant receives a line haul no charge is made on business switched to points located as follows: From 16th Street, on the Port Costa line, by way of Oakland Wharf and West Oakland, to the west end of the trestle, west of Alice Street on the Niles line and to the signpost east of drawbridge on the Alameda line. Conditions in respect to this switching movement, for which no charge is made, are substantially dissimilar, as compared with the conditions at Los Angeles.

In respect to Stockton: Between depot and industry tracks and private sidings within yard limits, where defendant receives line haul, switching is free. Between industry tracks and private sidings and transfer track of said Atchison Railway Company, freight, when originating at or destined to competitive points on said Atchison Company, is switched free; and between the same points, when destined to noncompetitive points on said Atchison Company, a switching charge of $2.50 per car is made. Between industry tracks
58 and private sidings and transfer tracks of the Western Pacific Railway Company, on shipments originating at or destined to noncompetitive points on the Western Pacific Railway Company, a switching charge of $2.50 per car is made. The conditions at Stock-

ton, in respect to free switching, are substantially dissimilar as compared with those of Los Angeles.

In respect to Sacramento: Between depot, industry tracks, and private sidings on B Street, between 7th and 16th Streets, where defendant receives a line haul, a switching charge of $1.50 per car is made, and a similar charge is made where defendant receives a line haul between depot and industry tracks on Front Street, between Q and R Streets. Between the depot and industry tracks and private sidings west of 7th Street and north of Q Street, where this company receives a line haul, freight is switched free; and the switching is free between Placerville branch yards and "I" Street; and brick is switched free, where defendant receives line haul, between depot and transportation company's landing. Conditions at Sacramento, in reference to free switching, are substantially dissimilar from those at Los Angeles.

In respect to Richmond: No switching charge is assessed at that point where this defendant has a line haul, but in cases where shipments are moved between points within the yards at Richmond, or where shipments are moved on the Richmond Belt Railway, switching charges are assessed.

VIII.

Defendant admits that the cities of Oakland, Stockton, and Sacramento are Pacific coast terminals and take the same freight
59 rates as the city of Los Angeles on commodities which move under terminal rates on interstate west-bound and east-bound freight originating at or destined to Colorado common points, Missouri River common points, and points east thereof, and that there are cases in which the cities of Fresno, Hanford, Visalia, Bakersfield, San Bernardino, Pasadena, Colton, and other intermediate points, take the same rates as apply to California terminals; and in this connection defendant alleges that rates on shipments moving to last specified points from Colorado common points, Missouri River common points, and points east thereof are, in most cases, higher than the rates applying to Los Angeles and other California terminals, and that the rates to said points are computed by adding to the terminal rate, from the nearest point taking terminal rates, the local rate to said specified California points.

Upon the ground that defendant has not sufficient information or belief upon the subject to enable it to answer, it denies that there are located at said California cities individuals, firms, or corporations who are competitors of said Los Angeles merchants and manufacturers in the distribution or sale of the kind of freight specified in Paragraph VIII of complainant's petition, or that said Los Angeles merchants or manufacturers meet with competition at said points from individuals, firms, or corporations located at Colorado common points, Missouri River common points, and points east thereof.

IX.

Defendant admits that the city of San Jose is a Pacific coast terminal and takes the same rates as Los Angeles on east-bound in-
60 terstate freight moving under terminal rates; and that when freight carried by Atchison, Topeka & Santa Fe Railway Company is delivered to said company by this defendant, under a joint arrangement for a continuous carriage or shipment, terminal rates apply.

Upon the ground that it has not sufficient information or belief upon the subject to enable it to answer, this defendant denies that there are located in San Jose, California, merchants or manufacturers who have industry tracks connecting with the lines of this defendant and who are competitors of said Los Angeles merchants or manufacturers in the distribution or sale of freight moving under rates named in said Tariff No. 3–E, or any other freight.

This defendant admits that in its Terminal Tariff No. 230–C, item 74 thereof, switching charges at San Jose between depot and industry tracks and private sidings within switching limits, as defined in item 103, on page 15 of said tariff, will be waived on shipments moving east bound under rates named in Transcontinental Freight Bureau East-bound Tariff No. 3–E, I. C. C. No. 318 and supplements thereto.

Defendant says that in some instances in the past free industry track receipts and deliveries have been in force in said city of Los Angeles, and that in other instances a charge as low as $1.25 has been imposed and collected in said city, but alleges that said free delivery and delivery at a lower rate than now in force were made at a time when the circumstances and conditions were substantially dissimilar from the circumstances and conditions now existing at said city of Los Angeles.

XI.

61 Defendant denies that the switching services rendered and which will hereafter be rendered to the merchants and manufacturers of Los Angeles by defendant in the transportation of interstate freight over said private industry tracks have been and will continue to be like in kind to, and contemporaneous with, the services rendered and to be rendered to the merchants or manufacturers of other cities whom complainant alleges to be in competition with the merchants and manufacturers of Los Angeles in the transportation of a like kind of traffic under substantially similar circumstances and conditions; and alleges that, on the contrary, the switching services at Los Angeles are performed under circumstances and conditions which are substantially dissimilar from the circumstances and conditions under which the switching services are performed for the merchants and manufacturers of other cities whom complainant alleges to be in competition with the merchants and manufacturers of Los Angeles.

XII.

Defendant denies that the cost of performing said switching service has at all been taken into account in fixing the freight rates as published in any of the tariffs hereinbefore referred to, except with reference to the terminal tariffs referred to by complainant; and denies that the freight rates, by reason of said switching charges, are at all greater than they would or should be if the allowance for performing such service was not made; and in this connection, defendant alleges that said switching charges are separate and
62 distinct charges made by defendant for performing an additional service for complainant.

Answering the second part of complainant's petition:

I.

Defendant denies that the compensation for the services of receiving and delivering interstate freight over and upon said industry tracks in the city of Los Angeles is at all included in the line haul rates or freight rates set forth in the tariffs referred to in complainant's petition, except as such rates are set forth in the terminal tariffs of defendant; and denies that the compensation for such service is at all paid together with or as part of said line haul or freight rates, or that the imposition or collection by defendant of any further compensation for said switching services, or the making of further charges therefor is at all unlawful, unreasonable, unjust, or void, or at all in violation of the act to regulate commerce or of any section thereof.

II.

Defendant denies that it is under no additional expense by reason of the rendering of such switching services in receiving and delivering said interstate freight over and upon said industry tracks; and denies that the imposition or collection of any charge for such services is at all unreasonable, unjust, or unlawful, or that said switching charge of $2.50 per car is at all excessive, unreasonable, unjust, or unlawful, or at all in violation of said act to regulate commerce, or of any section thereof.

III.

Defendant denies that the imposition or collection of said
63 switching charge, or of any charge for such services, is at all an unjust discrimination against the said merchants and manufacturers of Los Angeles, or at all an undue or unreasonable preference or advantage in favor of any competitive individuals, firms, or corporations in all or any of the cities alleged by complainant to be competitive with the merchants or manufacturers of the city of Los Angeles, are at all in violation of the act to regulate commerce, or of any section thereof.

Wherefore defendant prays that complainant take nothing by its complaint herein, and that the same may be dismissed.

SOUTHERN PACIFIC COMPANY,
By H. A. JONES,
Freight Traffic Manager.

P. F. DUNNE and
C. W. DURBROW,
Solicitors for Defendant.
WM. F. HERRIN,
Of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco, ss: } ss:

H. A. Jones, being duly sworn, deposes and says: That he is an officer, to wit, the freight traffic manager of the defendant, Southern Pacific Company; that he has read the foregoing answer and knows the contents thereof; and that the same is true as he verily believes.

(Signed) H. A. JONES.

Subscribed and sworn to before me this day of October, 1908.

_____,
Notary Public.

64 Exhibit D.

Before the Interstate Commerce Commission.

ASSOCIATED JOBBERS OF LOS ANGELES, COMPLAINANT,
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION; Southern Pacific Company, a corporation; and San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, defendants. } No. 1704.

Separate answer of San Pedro, Los Angeles & Salt Lake Railroad Company.

The San Pedro, Los Angeles & Salt Lake Railroad Company, one of the above-named defendants, for its answer to the complaint in this proceeding, respectfully says:

I.

For want of sufficient information, it is unable to specifically admit or deny the allegations contained in the first paragraph of said complaint, and it therefore leaves the complainant to its proofs in that behalf.

II.

This defendant admits the allegations contained in the second paragraph of said complaint.

65 III.

This defendant admits the allegations contained in the third paragraph of said complaint.

IV.

While this defendant has no specific or direct knowledge as to the matters alleged in the fourth paragraph of said complaint, it believes the same to be true.

V.

For answer to the fifth paragraph of said complaint, in so far as the allegations therein contained relate to this defendant, this defendant denies each and every such allegation therein contained, as to the terms and conditions of contracts or agreements between this defendant and persons, firms, or corporations for whose benefit special spur tracks or side tracks have been constructed, and particularly this defendant denies that it has any contract, agreement, or arrangement with any person, firm, or corporation having industries located upon any side track connected with its line of railroad, by which such person, firm, or corporation pay any sum of money as rental for the tracks to be used by it or them; and this defendant alleges that in some instances persons, firms, or corporations owning or leasing ground upon which industries have been located have solicited this defendant to extend a spur or side track connecting with its line of railroad to such industry, or to build a spur or connection thereof to and upon the grounds so owned or leased by such adjacent proprietors, and that at their instance and request in some cases
66 spur tracks have been constructed upon such grounds or adjacent proprietors, who have granted to the defendant the right to construct and maintain said tracks as its property upon said grounds and have given to this defendant the right to use the same, not only for the business of such industry but for any other business belonging to or pertaining to this defendant subservient, however, to the business of such industry; that in some cases trifling sums have been paid by adjacent proprietors to cover the cost of extra work and labor in laying down and constructing said tracks, but that the entire cost of maintenance and repairs, including taxes thereon, is paid by this defendant; that in many cases where any contributions whatever have been made by such adjacent proprietors in respect of such tracks the entire sum so contributed has been refunded to such adjacent proprietor and to such person, firm, or corporation, so that the entire cost has, in almost all cases, been paid or repaid by this defendant,

and in all cases such contributions have been repaid whenever and wherever the industry track has been erected or constructed upon the premises or lands owned or leased by the defendant; that the construction, maintenance, and operation of all such spur and side tracks are for the direct benefit of the industry served or to be served by them, and all represent economies provided by such industry for the handling of their in and out bound business, both as to time and expense of loading and unloading, and that if this defendant were to require all freight consigned to such industry to be loaded and unloaded upon team tracks, great expense would be incurred by such industry, both as to time and cost of handling such business into and out of their respective plants.

67 VI.

For answer to the sixth paragraph of said complaint, this defendant admits that it is a consenting party to Transcontinental Freight Bureau Tariffs No. 1-G, I. C. C. No. 375, and supplements thereto, applying on interstate traffic originating at Colorado common points, Missouri River common points and points east thereof, and destined to Pacific coast terminals and points intermediate; also to Transcontinental Freight Bureau Eastbound Tariff No. 3-E, I. C. C. No. 318, and supplements thereto, applying on interstate freight originating at Pacific coast terminals and destined to Colorado common points, Missouri River common points and east thereof, and points intermediate; and also numerous other tariffs applying on interstate freight to and from said Pacific coast terminals, but this defendant does not admit that the conclusion of the complainant, and its allegation of the duty of this defendant to receive and deliver interstate freight at its terminals without further or other charge beyond the freight rate applying to such points as duly established and published according to law, but, on the contrary, it denies said conclusion and alleges that the statement of duty is not a correct statement of the law in respect to the traffic handled and carried by this defendant, and, on the contrary, it alleges that it has not made any charge or collected any revenue for the carriage and delivery or freight under said tariffs having destination at Los Angeles other than according to and in compliance with the printed, posted, and published tariffs governing such charge, also filed with the Interstate Commerce Commission and referred to in this answer.

68 This defendant alleges that it does collect and receive at Los Angeles a charge of $2.50 per car for switching cars to and from certain so-called private tracks, which are, in fact, tracks owned by this defendant but set apart to a greater or less extent for the exclusive use of certain industries located upon its lines; that such charge of $2.50 per car for switching service is imposed and charged directly under the terms of this defendant's tariff, known as Terminal Tariff No. 20c, I. C. C. No. 228, item 42, which applied at Los Angeles between the defendant's freight yards or transfer tracks of connecting

lines and industries, warehouses, or private side tracks within the yard limits, upon freight, carloads (when incident to line haul, local or foreign).

This defendant further says that some of the industry tracks commonly used in respect of business having headquarters at Los Angeles are located within what are known as yard limits, and some are located outside of said yard limits, and some even are located outside the corporate limits of the city of Los Angeles, but all are within distance to which switching service is done at the rate prescribed by said tariff, namely, $2.50 per car; that the term "yard limit" has no significance whatever in respect of switching service, and is merely a designation of special territory in which certain operating rules in respect to the operation of terms, engines, and cars are enforced.

This defendant further alleges that it has located upon its line in the city of Los Angeles certain team tracks, which are located, respectively, at Meyers Street, Anderson Street, and Twentieth and Alameda Streets, upon which team tracks cars are set for unloading by consignees without charge; and that said cars of freight are de-
69 livered consignees at their request upon said team tracks free of switching charge; this defendant denies that the said team tracks are located in the immediate neighborhood of said industry tracks upon which deliveries of interstate carload freight are made and charged for under the terms of said tariffs, except in one instance, in which case the delivery to the industry track requires, in actual service, the spotting of cars at such industry track for the exclusive convenience of said industry, although so to do may and partly does involve the pulling and resetting of all cars upon the team tracks above referred to.

This defendant alleges that the term "yard limit" as used in said complaint, has no relation whatever to the switching of cars to and from industries, or to the receiving and transferring of freight as between connecting lines, or to or from industries upon the tracks situated within said yard limits; that within said yard limits the rules pertaining to the operation of engines, trains, and cars apply and require the running of said equipment at a greatly reduced speed, and under circumstances which enhance the cost of handling such traffic.

And this defendant denies that the cost of switching service to and from said industry tracks does not exceed the cost of like service to and from said team tracks, but, on the contrary, it alleges that the cost of handling and moving cars through the yards and over the tracks of the defendant in Los Angeles are greatly in excess of the cost of like cars to and from said team tracks; it submits that the cost of such service in other cities is entirely immaterial in respect of the allegations made against this defendant in this complaint.

70 VII.

For answer to the seventh paragraph of said complaint this defendant says that it is not sufficiently informed to either specifically admit or deny the allegations thereof, except that this defendant

admits that the conditions in respect of traffic at said several cities are not at all similar or like to the conditions which prevail in the city of Los Angeles; that the deliveries in some and many of the cities having no switching charge are enforced upon the carriers by competition, not only as between themselves, but by the competition of other carriers not subject to the act to regulate commerce; this defendant, however, upon information and belief alleges that at some of the cities and places named in the first clause of paragraph seven of the complaint, switching charges for services like those complained of herein are imposed;

Defendant alleges that its rails do not reach any of the towns named in said paragraph seven, except the towns of San Bernardino, Colton, and Pasadena, none of which points are Pacific coast terminals, nor does the traffic to and from said last-named points move under the terms of any of the terminal rates mentioned in said complaint or in this answer. This defendant submits that the remaining allegations of said paragraph seven of the complaint herein are, as to this defendant, wholly immaterial.

VIII.

For answer to the eighth paragraph of said complaint, this defendant alleges that the only towns which are reached by the rails of this defendant which are mentioned in said paragraph are Colton, San Bernardino, and Pasadena and the city of Los Angeles; that
71 neither Colton, San Bernardino, or Pasadena are given Pacific coast terminal rates which apply at Los Angeles, but that substantially all goods from Colorado common points and east thereof, destined to Colton, San Bernardino, or Pasadena take a higher rate than those prescribed in the Pacific coast terminal rates.

IX.

For answer to the ninth paragraph of said complaint this defendant says that it has no knowledge or information concerning the allegations therein made, except as stated in said complaint, and therefore it leaves the complainant to its proofs in that behalf.

X.

For answer to the tenth paragraph of said complaint, this defendant submits that the allegations of said paragraph are so uncertain and indefinite that it is impossible for this defendant to answer the same, and submits that it should not be required to pretend to answer allegations so barren of specific charges; but this defendant denies that if any of such practices existed, that the same existed under cir-

cumstances and conditions at said time or times which are substantially similar to the circumstances and conditions now existing.

XI.

For answer to paragraph one of the second division of said complaint, this defendant alleges that the switching service rendered by this defendant to its patrons in the city of Los Angeles, is not rendered under the same circumstances and conditions as the
72 switching service rendered to its patrons in the other cities or towns in Southern California which are reached by its rails, but that the cost of property and cost of switching service, and also the cost of all service rendered to shippers in the city of Los Angeles is greatly in excess of like service rendered at Colton, San Bernardino, and Pasadena to its patrons; that it is not necessary or desirable in the transaction of its business to maintain any switching crews, switch engines in any other towns than in the city of Los Angeles, and that therefore the circumstances and conditions surrounding the delivery and switching of cars to and from industry tracks in the city of Los Angeles are wholly different from those surrounding the delivery and switching of like cars upon the side tracks in either Colton, San Bernardino or Pasadena.

XII.

Further answering said paragraph one of the second division of said complaint, this defendant submits that it should not be required to specifically answer said allegations, because the same are uncertain, indefinite, and argumentative, but by way of argument this defendant might well say that the cost of switching at Los Angeles was considered by the defendant in fixing its through rates to Los Angeles, and that but for such charge the Pacific coast terminal rate to Los Angeles would be greater than is now charged.

73 XIII.

Further answering said paragraph one of the second division of said complaint, this defendant denies that its compensation for the service of receiving and delivering interstate freight over and upon said industry tracks located upon its line in Los Angeles are, any of them, included in the line haul rates or freight rates set forth in said tariffs, and it denies that the compensation for such switching service is paid together with or as any part of said line haul rates or freight rates, and it denies that the collection of said switching charges or the making of such charges in said complaint specifically complained of, are either unlawful, unreasonable, unjust, or void, or that the same is in violation of the act to regulate commerce or any section thereof.

XIV.

For answer to the second paragraph of the second division of said complaint, this defendant denies that it is not put to additional expense by reason of the rendering of such switching service in receiving and delivering interstate freight over and upon said industry tracks, but it alleges the truth to be that in each case the service rendered in switching to and from said industry tracks is a special service particular to receiving and delivering in carload lots to or from said industry tracks; this defendant denies that the imposition or collection of any charge for such service is either unreasonable, unjust, or unlawful, and it denies that the switching charge made for such service, of $2.50 per car, is either excessive, unreasonable, unjust, or unlawful, or in violation of the act to regulate commerce or any section thereof.

74 XV.

For answer to the third paragraph of the second division of said complaint, this defendant denies that the imposition and collection of such switching charge, or of any switching charge for such service so rendered in respect of transportation of interstate business, is either unjust discrimination against the merchants or manufacturers of Los Angeles, or amounts to or is an undue and unreasonable preference and advantage in favor of any competitive individuals, firms, or corporations in all of the other competitive cities named in said complaint, and denies that the same is in violation of the said act to regulate commerce or any section of said act.

Wherefore, this defendant having answered fully, prays that it may be hence dismissed with its costs.

San Pedro, Los Angeles & Salt Lake Railroad Company.
By (Signed) W. R. Kelly, *General Counsel.*

75 United States of America,
State of California, County of Los Angeles, ss:

The affiant, F. A. Wann, having been first duly sworn, deposes and says that he is the general traffic manager of the above-named defendant, San Pedro, Los Angeles & Salt Lake Railroad Company; that he has read the foregoing answer of said defendant and knows the contents thereof, and that the statements therein made are true, except those made on information and belief, and as to those he believes them to be true.

(Signed) F. A. Wann.

Subscribed in my presence and sworn to before me this 8th day of September, 1908.

(Signed) Francis J. Mieding,
[seal.] *Notary Public.*

76 Exhibit E.

ASSOCIATED JOBBERS OF LOS ANGELES
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL. } No. 1704.

Submitted December 2, 1909. Decided April 5, 1910.

1. Charge of $2.50 per car exacted for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within carriers' switching limits found unlawful when such carload freight is moving incidentally to a system-line haul; charge found not unlawful when such carload freight is moving incidentally to a foreign-line haul.

2. The spurs and sidetracks which connect industries with a carrier's rails within switching limits found to constitute a portion of the carrier's terminal facilities.

3. The delivery of a car upon an industrial siding found to be a substitute for delivery upon public team tracks, and, no additional service being involved, cannot be made the basis for an additional charge.

Joseph P. Loeb and Edward J. Kuster for complainants.

T. J. Norton and E. W. Camp for Atchison, Topeka & Santa Fe Railway Company.

P. F. Dunne and C. W. Durbrow for Southern Pacific Company.

77 *Report of the commission.*

Lane, Commissioner:

Attack is made in this proceeding upon the charge of $2.50 per car made by the defendant carriers for delivering or receiving interstate carload freight to or from industries located upon spurs or sidetracks within their switching limits when such carload freight is moving incidentally to a line haul and the carrier receiving or delivering such freight receives the whole or any part of the compensation for such line haul. The complaint is directed against two separate and distinct practices, involving, on the one hand, the switching charge incident to a system-line haul, and, on the other, the switching charge incident to a foreign-line haul. These charges are carried in local terminal tariffs published by the respective defendants, as follows:

Amendment No. 9 to Santa Fe tariff, I. C. C., 4281:

"Between all points located within Los Angeles switching limits, freight carloads (when incident to line haul, system or foreign), $2.50 per car."

Southern Pacific Terminal tariff, I. C. C., 3011:

"Between depot and industry tracks and private sidings within switching limits as defined in item 100 on page 15 of this tariff, including team tracks at Vernondale, Nadeau, Winthrop, Grand Ave-

nue, University, Aurant, and Maier, Cal., 'Freight, carloads, when incidental to a line haul, rate per car $2.50.'"

San Pedro, Los Angeles & Salt Lake Railroad Company's terminal tariff, I. C. C., 28:

"Between San Pedro, Los Angeles & Salt Lake Railroad freight yards or the transfer tracks of connecting lines and industries, warehouses, or private sidetracks within yard limits (when incident to line haul, local or foreign), $2.50 per car."

78 Complainant contends that the charge when made incident to a system-line haul is illegal inasmuch as the service for which the charge is made is an ordinary and necessary incident of carriage, that the compensation for that service is and must be included as a matter of law in the freight rate, and that the segregation of this charge is not permitted by law. In addition the complainant insists that the charge constitutes an unlawful discrimination under section 2 of the act to regulate commerce, also that it constitutes an unlawful preference under section 3, and that the charge for the service, if such charge may be made, is unreasonable and excessive in amount. As to the charge when made incident to a foreign-line haul, complainant urges that as each defendant receives out of the through rate from the connecting line a minimum compensation of $7.50 per car for the service between the interchange tracks and the industries, it is unreasonable and unlawful to exact an additional sum from the shipper for the same service; that the switching line is merely a connecting carrier participating in the joint rate; that inasmuch as the bills of lading contemplate service on industry tracks, even when such service is incident to a foreign-line haul, the carrier issuing the bill of lading must fully perform its contract without additional charge.

Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freigh' sheds, derricks, roundhouses, and other structures. Freight

79 moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over and above the freight rate named in the tariffs, while at industry spurs an additional charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the "lead" to serve other industries in the immediate neighborhood. These spurs have been constructed under substantially uniform contracts. The standard form of the Southern Pacific Company provides as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such rail-
80 roads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

The Santa Fe contract contains this provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

None of the industries at Los Angeles furnishes its own motive power, and interline switching is done from the interchange track to the industry by the locomotives of the delivering line, the carrier performing the switching service.

The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations, both of these contentions are sound. These industry spur tracks are not private, in that the carrier may use them for purposes of its own—as for storage of cars, as leads to other industries, and sometimes for public delivery. They are often laid

upon public streets and over private property, are operated
81 exclusively by the railroad with its own engines, and furnish means of interindustry conveyance by rail, for which the carrier properly imposes a switching charge. Thus, in connecting its main line directly with a spur, the carrier serves itself in various ways; its gains an extension of its own line for various terminal uses, makes a new highway for intercommunication between the carrier and the industry and likewise between each industry so connected and all others having a similar connection, and it attaches the industry to the carrier in such a way that the latter has a practical assurance of the industry's traffic both outbound and inbound. On the other hand, there can be no doubt but that the industry also benefits by such connection, in that it can receive by this spur track direct delivery of its freight without the expense and trouble of draying to and from public team tracks. Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a special, and generally in practice an exclusive, railroad depot for the carload freight of a particular shipper. There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroads to develop traffic and facilitate its movement by the construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple,
82 the sawmill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is, in fact, a necessity to both the carrier and the shipper under modern conditions of business and transportation.

We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers. In saying this we are fully conscious of the authority of the Alton case (Chicago & Alton v. United States, 156 Fed. Rep., 558) and the General Electric and Solvay Process cases, 14 I. C. C. Rep., 237, 246. Such industrial spurs as are here considered, however, are of a totally different character and of a different nature from those considered in these three named cases. They correspond rather to the railroad tracks leading to the interchange tracks with such industries, and the switching movement given by the carriers without extra charge to such interchange tracks passed unquestioned in the above cases. It was assumed by court and commission that there was no violation of law in placing a car at a point where an industry

engine could connect with it and take it within the plant. But in Los Angeles there are no tracks of this character. Each of the spurs here considered is in a real sense a railroad terminal at which the carrier receives and delivers freight. In recognition of such relationship the carriers of the land universally treat such industry spurs as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in.

83 To this generalization, covering perhaps ten thousand cities and towns in the United States, the defendants could name but three exceptions, the cities of Los Angeles, San Francisco, and San Diego. In these an additional charge is made for track receipt or delivery. When asked why this charge was made at these points, the traffic manager of one road replied, "Because we can get it." Another railroad official explained the nonexistence of such a charge at all other points upon his own line, as well as throughout the country at large, by saying that the absence of such charge was a "tribute to competition." It appears that the same charge for such delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city. It was first imposed by the Southern Pacific, and as the other lines came in they adopted the policy of the line already there. As to certain commodities such charge was not imposed until quite recently, and at all times, until the Hepburn Act went into effect, there was great variation in the charge as between individual shippers.

There are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points. The theory justifying these lower rates is that water competition compels their maintenance, yet in only the three cities named is there such a charge for spur-track delivery, though in many of such places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal rates, the Southern Pacific, Northern Pacific, and Great Northern lines impose no such charge, and to the east where defendant lines have their termini in cities competing with Los Angeles this charge is also unknown.

84 The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. These various services may be broken up into their component parts and a charge imposed for each, as is the case in England, where by law the Government has fixed a schedule of maximum rates for "conveyance" between stations and a separate schedule of maximum terminals, so called, which includes a fixed charge, uniform throughout the country, for a "station terminal" at each end of the haul, if the station is used, but not otherwise. So that, under the English system, in order to arrive at the total rate applicable upon a shipment, the conveyance rate must be added to the station terminal. ("Service terminals" for loading and unloading, etc., are also separately stated and charged for.)

This method of stating rates has never obtained in this country, at least so far as the records of this commission show. The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling but the charge for the use of the terminals at both ends of the line.

The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules, which shall be published and filed with the commission, "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed," it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the
85 terminal at both ends of the line. The terminal charges referred to in section 6, and which must be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge. They treat a dependent spur as a part of their own depot to which the published rate carries all freight. They have recognized the value of having industries located on their tracks and have competed, in proper and in improper ways, to secure them as dependencies. They have accordingly given to such industries the same service that they give at their team tracks, treating the one as the substitute or equivalent of the other. If delivery is made at the team track the carrier must haul the car from the main line and place it on the team track. And so, if delivery is to be made at an industry, it must be conveyed from the main line to the industry. In the former as in the latter case there is an interterminal switching and a placement of the car.

The refinement of the English method of stating rates has not appealed to the mind of the American railroad man, for the same reason, perhaps, that American hotel keepers do not make a separate charge to their guests for lights or soap. The American railroad rate is made to cover a terminal delivery, while the English railroads make a separate charge for the use of their terminals. In England
86 if the terminal of the carrier is not used, the stated terminal charge is not imposed. Beale & Wyman, "Railroad Rate Regulation," sec. 694; L. & Y. R. v. Gidlow, L. R. 7 H. L., 517; N. S. R. v. Salt Union, 10 Ry. & Ca. Tr. Cas., 161; Tennant & Co. v. Caledonian Ry., 10 Ry. & Ca. Tr. Cas., 194; Simonds & Son. v. G. W. R., 3 Boyle & Waghorn, 17.

In the case of the North Staffordshire Ry. Co. v. Salt Union, supra, it was said:

"It is not implied in our judgment that the railway company can charge beyond the conveyance rate for anything done on their own lines which is properly incidental to delivery or collection of traffic to or from sidings, no matter how much the cost and trouble may be increased by the inconvenience of the siding or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect. The very existence of a siding implies, in practice, that the railway company must, in order to collect and deliver from or to the siding, do on their own lines something beyond the mere work of transit. But they may be entitled to make a carrier's or service charge if they are required, for the convenience of the siding owner, to do work on his siding, and where they are so required, then, if by reason of the insufficiency of the siding or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge."

The English cases, as a whole, seem to proceed upon the theory that a switching movement onto a "private" siding, one not owned by the railroad and which is not a part of the railroad's own terminals, justifies an additional charge in some cases, but one not equal to the rate that would be charged if delivery had been made upon the railroad's own terminal. In this country the railroads have recognized by universal custom that it is but fair, where their team
87 tracks are not used to give delivery without extra charge at an industry track as an equivalent service, although where the shipper provides tracks, land, and facilities the mere switching service furnished by the carrier is in many cases by no means equivalent in cost to the expense attaching to delivery upon its own tracks.

The theory of defendants is that in placing the car upon a side track it is giving a terminal service in the nature of cartage by rail, ignoring the fact that this so-called cartage antecedes any delivery and is nothing more than the placing of a car on a specially indicated spur track instead of in a large yard. Cartage may, of course, be furnished as an accessorial service by the delivering carrier and it may charge therefor as a distinct and separate terminal service, but such cartage presupposes delivery upon the team tracks of the carrier and is supplementary thereto. It is a service additional to that which the regular tariff rate pays for and therefore may, possibly must, be properly the subject of an additional and distinct charge. The parallel between such service and the delivery made upon a spur track could only be found if the car were first ordered by the consignee to be placed upon a team track for delivery and later, after such movement had taken place, was ordered to the private track of the consignee. For such a switching, terminal service carriers may charge, and in fact do, but to such charge no exception can properly be taken. It is a terminal charge of the character required to be published

under section 6 of the act to regulate commerce, a charge for a service rendered at a terminal supplementing the delivery which the carrier has given and for which it has been paid in the transportation rate. The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the
88 carrier's tracks which is removed at a greater or less distance from its public yards. Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.

Again, it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks or at the sheds and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards which lie at the entrance to the city and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. Before the cars are placed the consignees are given notice of the tracks to which they are to be sent, so that there is no confusion, and the switch engines which place the cars on one track
89 also serve to haul the "loads" in and "empties" out at the other tracks. After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.

An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done.

Since this case was argued before the commission, the Supreme Court of the United States has handed down an opinion, written by Mr. Justice Brewer, in what is known as the Union Stock Yards case,

and the carriers defending have drawn our attention to this case as fully supporting the position which they take. That opinion holds that a carrier is justified in charging a reasonable rate for a delivery which it can not make upon its own line, and that this rate, when separately stated, must be judged as to its reasonableness by itself. The doctrine therein announced we accept fully. We have no right to take from an independent delivering road any portion of a reasonable charge because the line charge, when added to the transportation rate of a connecting line, makes an unreasonable total charge. We must deal with the unreasonable rate of the preceding carrier,
90 if the aggregate of the rate to destination and the special delivery required is excessive and unlawful.

In the Union Stock Yards case emphasis is placed upon the fact that the Union Stock Yards Railroad is the property of a separate and distinct legal entity, which makes a charge for the service it renders to the main line entering Chicago. That rate for the service given, having been held to be reasonable, was not properly subject to reduction because other rates of connecting roads which form the through route were unreasonable. Therefore, says the court—

"If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced, the Union Stock Yards Company will suffer loss while the real wrongdoers will escape."

In other words, if the Southern Pacific Railroad at Los Angeles made connection with an independent belt-line railroad, which led to various industries, and provided in its tariffs that delivery on such belt line would cost $2 extra per car, this commission could not reduce this $2 charge, provided the same were reasonable for the service which the belt line gave. Such holding is not tantamount, however, to a finding that the Southern Pacific might itself charge $2 for delivery to such industries when located on its own tracks, if such delivery was no more expensive than the delivery included in its own transportation rate. The governing principle of Mr. Justice Brewer's opinion is that one carrier may not be made to suffer
91 for the shortcomings of another. The Stock Yards Railroad should not have its revenue abridged because the Rock Island Railroad, for instance, charges a rate to Chicago which includes the cost of a delivery which it does not render. In attacking the unlawful charge we must move back from the terminal road exacting the reasonable rate for the service it gives to the connection charging an excessive amount for its service. This is far, indeed, from holding that a carrier which delivers freight at a spur track at its own terminal is rendering a service which justifies the imposition of an additional charge. In fact, Mr. Justice White, in a preceding case arising out of this terminal charge at Chicago, distinctly held that the prin-

ciples laid down in that decision, I. C. C. v. C., B. & Q., 186 U. S., 320, were not to be construed as necessarily governing in a case where delivery was made upon a carrier's own tracks.

We have dealt heretofore with delivery on industry tracks which are a part of the terminal system of the carrier having the line haul. We now come to consider the second question involved in this case: The legality of the charge of $2.50 per car imposed for delivery upon industry spurs when the line haul is made by a foreign carrier. To illustrate: Freight originating at Kansas City, Mo., may be sent to Los Angeles by either the Southern Pacific or the Santa Fe. The Southern Pacific solicits a carload of freight destined to a consignee in Los Angeles who has an industry spur to the Santa Fe line. The Southern Pacific would lose the transportation of this freight did it not have an arrangement with the Santa Fe Railroad by which the latter agreed to deliver the car upon the spur of the consignee. To effect this purpose, and for mutual advantage, the carriers have entered into an arrangement by which they mutually effect
92 delivery upon each other's industry spurs. This is one of the advantages of having such sidetracks. Accordingly the Southern Pacific carries the Kansas City car to Los Angeles and in that city places it upon what is known as an interchange track, a track used by both of the carriers for the interchange of equipment. From that point the car is conveyed by the Santa Fe to the designated sidetrack of the industry. Under the tariffs quoted above the consignee pays to the Santa Fe road for such service, in addition to the through rate from Kansas City to Los Angeles, an arbitrary delivery charge of $2.50. It appears, however, from the record in this case that this is not all that the Santa Fe receives for the service which it renders. An agreement exists between the two roads by which the Southern Pacific pays to the Santa Fe 50 cents per ton, or a minimum of $7.50 per car, for the privilege of having delivery made upon the industrial tracks connected with the Santa Fe road. That there may be no mistake as to just what the purpose of this arrangement is we will quote at some length from the testimony of Traffic Manager Chambers, of the Santa Fe. Being asked by the attorney for that road, Mr. Camp, as to the justification for such an arrangement, Mr. Chambers said:

"It was largely for the privilege of one line being permitted to do business to the industries located on the other, figuring that the lines serving the industry lost the line haul on those shipments.

"Mr. CAMP. It was a charge for the use of the Southern Pacific terminal so far as our line was concerned?

"Mr. CHAMBERS. Yes.

"COMMISSIONER. It is practically making a joint rate over onto the other's tracks?

"Mr. CHAMBERS. Yes, sir; that is what it is. The Santa Fe
93 could reach the industries on the Southern Pacific rails prior to that time by delivering to the Southern Pacific at Stockton

and giving them 25 per cent of the Missouri River rate, or west of the Missouri proportion of the through rate.

"COMMISSIONER. So that by the existence of a large number of industries on industrial tracks on the Southern Pacific lines in San Francisco they get a proportion of your through rate on business which you haul into San Francisco because of the interchange and for the interchange service?

"Mr. CHAMBERS. Yes, sir; business that we haul in for those industries.

"COMMISSIONER. Is it usual as between carriers where they do not serve the same territory?

"Mr. CHAMBERS. It is, of course, on competitive business altogether. On noncompetitive business there is no reason for it at all and it does not apply on the noncompetitive business.

"COMMISSIONER. Then they make an interchange arrangement at a terminal point?

"Mr. CHAMBERS. Yes, sir. That is the condition as between the Santa Fe and Southern Pacific as to switching arrangements. In some places the charge is $10 a car, some $5, some $3; it varies; and some so much per hundred pounds.

"COMMISSIONER. This does not apply here from any points that both lines do not reach?

"Mr. CHAMBERS. No; it applies just on competitive business.

"Mr. CAMP. And is a hiring of the other company's facilities for that service?

"Mr. CHAMBERS. Yes.

"Mr. MANN. It is paid to the other company, this $7.50 per car, for what purpose?

"Mr. CHAMBERS. I have just explained, for the privilege of reaching facilities on the tracks of the other.

"Mr. MANN. And in order to receive that $7.50 per car from the Southern Pacific for placing a Southern Pacific car at one of your industries, what does that $7.50 pay for to your company?

94 "Mr. CHAMBERS. It pays for the same thing, it pays for the privilege, and the Southern Pacific have got to pay for the privilege of getting onto our lines.

"Mr. MANN. Is it not for the purpose and privilege, as you say, for the facilities of your company; is it not for the privilege of the industry tracks of your company which are among its facilities?

"Mr. CHAMBERS. For the industry tracks?

"Mr. MANN. Yes.

"Mr. CHAMBERS. Yes; it is confined to the industry tracks.

"Mr. MANN. Then the $7.50 pays for that car reaching the industry tracks?

"Mr. CHAMBERS. Yes; that is——

"Mr. MANN. Why do you charge $2.50 more for the extra?

"Mr. CHAMBERS. That is a separate service altogether. It is just like any other division arrangement.

"Mr. MANN. I have understood you to just say that $7.50 pays for the car reaching the industry.

"Mr. CHAMBERS. We could not afford to have a switching line for any other purpose than doing switching, and do it for $2.50 a car, and you must figure, also, that allowing the other line to reach the industry on an equality with yourself you put them in a position to compete with you, and you have to have something for that. You lose the line haul on that traffic. Otherwise you are very likely to get it, and it is a question of two or three or four hundred dollars; and then there is considerable risk, also, which has to be assumed by the switching line.

"Mr. MANN. My difficulty, Mr. Chambers, is this, and I think perhaps you understand it. If you have received $7.50 for the purpose of taking the industry car and giving to the Southern Pacific your facilities, among which, of course, are your industry tracks, I do not see why you should charge $2.50 more to the industry after having been already paid $7.50 for the service.

"Mr. CHAMBERS. Frequently the division of the through
95 rate from the junction point to the destination is greater than the local rate is between local railroads, and there is something charged for allowing the other line to reach the destination in competition with the line which controls the destination point, just like it is between the Southern Pacific and ourselves. We get to San Jose, for example, from the east; they get 23 per cent of the terminal rate and the local rate in addition—not to San Jose, but some point that is not a terminal."

On this same subject Mr. G. W. Luce, general freight agent of the Southern Pacific system, testified with reference to the San Francisco situation, which is the same as at Los Angeles, as follows:

"Mr. LUCE. I think the Santa Fe's rails reached San Francisco in 1902; that is, they were doing some business, but they were not actually open for business at that time, except by the handling of our engines over joint track. A short time afterwards they applied to us for an interchange arrangement between their company and ours, in San Francisco. We replied to them that there could be no interchange here, for the reason that interchange was indicated by or covered what we might call reciprocity. They had nothing at all to give us for what we gave them, and therefore there could be no interchange. We stood on that ground until after the fire—some time in 1907. When the downtown district was burned, quite a few people went to the tracks of the Santa Fe and a few went to our tracks. They then had some business that we might enjoy that we could not otherwise if we had not interchange arrangements, and we felt then that the interchange could take place, because they had business on their rails. We did not feel, when they came in with their bare rails, we should turn over a part to them of our business, which was an accumulation of a quarter of a century; and our expenses in this city permitted them to secure business from us, and we secured $2.50 nominal switching charge, while the merchants

then on our tracks were able to route via the Santa Fe, if they
96 wanted to, via the Mojave gateway; and we would place on their tracks reaching San Francisco the same as we would via Ogden or El Paso. Therefore the merchants had no reason to complain, because they could reach our tracks via the Santa Fe at Mojave as well as via the San Francisco interchange, so far as desiring to give the Santa Fe business was concerned. We would of course get, in comparison with our revenue by the other gateways—Ogden and El Paso—a very small revenue; but after they had some business we thought we might want to share in, a mutual interchange of traffic took place, and we made the arrangement set forth—that is, 50 cents per ton on Colorado traffic and east, both originating at and destined to those points—and we made the same arrangement at all interchange points, such as Visalia, Fresno, Stockton, and Los Angeles.

"Mr. DUNNE. On the same terms?

"Mr. LUCE. On the same terms, for the reason we could not surrender our business for a mere pittance of $2.50 a car; and they acquiesced in that and thought it was fair and made the same terms, and we likewise made the same terms with the San Pedro Railroad at Los Angeles.

"Mr. DUNNE. That, then, was strictly an intercorporate arrangement?

"Mr. LUCE. Yes, sir.

"Mr. DUNNE. It was not an arrangement as between the carrier and the shipper?

"Mr. LUCE. Not at all.

"Mr. DUNNE. And it was based upon what you thought to be just and equitable principles under the circumstances?

"Mr. LUCE. Yes, sir; merely for the transmission of our traffic to another carrier's rails, and not for switching service to the breaking up point at all."

So far, therefore, as the carriers are concerned, the Southern Pacific Railroad, upon a haul from a competitive point, pays out of its
97 rate (and this expressly appears to be the fact) a minimum of $7.50 per car for the right to have delivery made upon the Santa Fe's industry spurs. The Southern Pacific gives no delivery at its terminals, but switches the car to an interchange track, from which the Santa Fe takes it to the consignee's industry spur, and it is to be noted in this connection that this arrangement applies exclusively as to industries having spur tracks. (There is no such interchange between the two carriers for delivery upon their respective team tracks.) The Santa Fe receives a minimum of $10 for such delivery, $7.50 being paid by the Southern Pacific and $2.50 being paid by the consignee. The question presented is whether the charge made by the Santa Fe under such circumstances is lawful.

It is the contention of the complainants that this $7.50 paid by the Southern Pacific is in full payment for the switching charge to the industry, and that the consignee should not be required to pay $2.50

or any amount additional. We think that as a matter of law, as announced by the Supreme Court, the position of the complainants can not be sustained. A delivery is here made upon the tracks of another carrier, and a separate charge is made therefor and stated in the tariffs, although the Southern Pacific undertakes to make delivery upon the Santa Fe industrial spur and has entered into an arrangement with the Santa Fe to effect this end. It may not be said, we think, under the authority of the Union Stock Yards case, that such delivery may not be the subject of a distinct and separate charge, notwithstanding the fact that the connecting carrier for its own purposes makes a payment to the delivering carrier—either as a bonus, if there can be such a thing recognized in the law, or for the use of its terminal facilities—which is three times the amount of the
98 switching charge imposed. If a shipper desires delivery made upon the Santa Fe tracks, he can ship by way of the Santa Fe without incurring the switching charge of $2.50 per car under the holding in this case. If, however, he prefers to ship by way of the Southern Pacific road and have delivery made upon the Santa Fe industrial track, the terminal charge imposed by the Santa Fe must be regarded as an additional charge for an additional service. We do not find in the record sufficient data upon which to base a finding, as to the reasonableness of the amount of this charge of $2.50 for interline switching to industry tracks, and for the purposes of the present order will assume it to be reasonable.

An order will be entered condemning as illegal and unjust the charge of $2.50 per car made by the defendant carriers for delivering or receiving interstate carload freight to or from industries located upon spurs or sidetracks within their switching limits when such carload freight is moving incidentally to a system-line haul.

Prouty, Commissioner, concurring:

I do not think that the rate carries with it, as a general proposition, delivery upon a private track. Under many circumstances a carrier may refuse altogether to make a private-track delivery, and it may impose different charges for different deliveries of that character. But it seems to me that here these defendants, by their conduct, have made these spur tracks a part of their terminal facilities and that they must be so treated until the whole method of doing business has been changed.

This record shows that the cost to the railway of making delivery upon the private track is no greater than upon team track. It is worth more to the shipper to receive his car upon the private track, but it appears that the expense of furnishing these private
99 tracks is often very considerable and that, on the whole, the shipper, by furnishing the track, pays all he ought to for the privilege. Inasmuch, therefore, as it costs the defendants nothing additional to render this service, and as the shipper has paid for the value of the service to him, it seems to me unreasonable that the railroad should impose and collect this charge. The carrier thereby

charges for a service which costs it nothing, and the shipper is charged for a service for which he has already paid.

Harlan, Commissioner, also concurring:

In adjusting their rates with a view to drawing from the shipping and traveling public sufficient revenues to meet the cost of operation and maintenance and to pay a reasonable return on the investment carriers have not been left altogether free of restriction and beyond control. Certain general principles have been established to which they must conform in costructing their tariff schedules. The law provides that an interstate carrier shall charge no more than a reasonable rate for each service that it undertakes on behalf of a shipper or passenger, and that in fixing its charges it must refrain from discriminations and preferences. It follows, therefore, that its rate schedule can not be constructed at haphazard, but must, in an orderly, logical, and consistent manner, be built up not only on the basis of reasonableness but so as to avoid the inequalities that the law forbids and makes unlawful. It was the wrong done by carriers through their rates that caused the legislative power to set boundaries to their former comparative freedom in rate making and to establish certain fixed principles for their control. The law now requires that rate schedules shall be constructed upon a foundation of justice to the shipper as well as to the carrier and upon broad equities with respect to the rights of communities as well as of individuals.

And it is because I think the defendants, in setting up the particular charge here complained of, have departed from these principles, that I venture, in the form of a concurring opinion, to give expression to the impression that an examination of this record has made upon me:

The ordinary shipper of merchandise by the carload must incur the expense of hauling his shipments by wagon to a public-team track at which the carrier has placed its cars for loading. He must incur a like expense in taking his inbound carload freight to his factory or warehouse or place of business. The large shipper, on the other hand, by erecting his factory or warehouse near the line of a carrier and having it connected with the carrier's tracks by a spur track of his own, is enabled to load and unload the car at his door and thus to save the very heavy wagon expense that the handling of his traffic would otherwise require. When the results are compared it is clear that the shipper that enjoys the benefit of a spur track and a store-door delivery has a decided advantage over shippers that haul their merchandise by wagon to and from the public team tracks. And, considered theoretically and purely from the standpoint of the value of such a delivery to shippers, the placing or "spotting" of cars on spur tracks at the doors of warehouses and factories might be regarded as an extra service for which, as is actually done at the points here involved, the carrier might make a charge in addition to the rate. Nevertheless it has been the universal practice in this country for the carrier having the line haul not to make an additional

charge for setting a car for loading or unloading at the shipper's door upon a spur or side track connected with its own termi-
101 nals. Counsel advise us that there is no exception to this general custom except at three points involved in the complaint, namely, San Francisco, Los Angeles, and San Diego; if further exceptions exist, and at this moment I recall none, they must be few in number and are doubtless the result of special conditions.

The general rate schedules of carriers have been adjusted on the theory that the rates ought to be fixed high enough to warrant carriers in including the spur-track service without extra charge, and not on the theory that additional revenues would be available from that source. The carload rates of carriers to and from a given destination by long-established custom include the switching of the car to and from the store door on spur tracks directly connected with their respective terminals; and this is no less true under joint through rates. I do not stop, therefore, to consider whether the charge now made for such a service at San Francisco, Los Angeles, and San Diego is a reasonable charge. Its reasonableness may be conceded; at any rate, the shipper at these points, even though on a spur track, may still insist on his right to load and unload his cars by wagon on a public-team track if he finds that a more economical course. Nor do I lay any particular stress upon the fact, which this record seems to establish, that the public team tracks of the defendants at the points in question are inadequate to enable them to handle the commerce of those communities without the additional facilities that the private spur tracks give them. These details I do not regard as controlling, although not without significance. My point is that the defendants, in separating the spur-track service from the line haul to these three points and dealing with it as an additional service for which an additional charge may be made, depart from the
102 general practice of carriers and their own practice at other points, and in doing so thereby violate not only section 3 of the act but section 1 as well. A system of rates built in strict recognition of the principles embodied in the first four sections of the act must inevitably be reasonable, free from preferences, without discriminations, and containing no rates without justifying cause that are lower for the longer than for the shorter haul. A schedule of rates so adjusted must of necessity be consistent and harmonious. Assuming for the purposes of this proceeding that the several rate structures of these defendants have been built upon foundations of general reasonableness and freedom from unlawful inequalities, they seem to me, nevertheless, inconsistent and inharmonious in respect of the particular charge of which complaint is here made. Examining the schedules in detail, we find that one of the principles appearing throughout their whole structure is that the rates, whether local or joint, include delivery at store door on spur track. The consistency and harmony of the structure is destroyed by the fact that at these three points alone, out of all other points on their lines, store-door delivery on spur tracks is considered by the defendants as

a separate service, in addition to the transportation to those points, and an additional charge is made therefor. In my judgment this departure from the general theory upon which the schedules were built subjects those points to an undue discrimination and makes the through charges unreasonable. Not only do the defendants at those points put their tariff schedules at variance with the universal practice of carriers, but, without a justifying cause so far as the record discloses, they make an exception at those points to a fixed principle that underlies their own general rates. Upon broad equitable
103 grounds this seems to me to result in an unreasonable imposition upon the commerce of those three communities, the burden of which, as I understand the record, approximates $200,000 a year.

The inequity of the situation is emphasized by the fact that identical rates for the transportation of all class traffic from trunk line and other defined territory have been extended to some 97 points at or near the Pacific coast, including San Francisco, Los Angeles, and San Diego. This adjustment has a history of many years and its significance and cause are thoroughly understood. The "terminal" rates, as they are called, are transportation rates and their extension to these 97 points seems to me to constitute a substantial admission by the defendants that the conditions and circumstances affecting transportation to those points are the same. At all these points, except the three here involved, the terminal rates include the movement of cars to and from store door on spur tracks directly connected with the terminals of the several defendants. At these three points alone is the service to and from the spur tracks separated from the line haul as an independent service. Under such circumstances I do not see how an additional charge may be justified. It is not necessary to inquire whether, as between a shipper using a team track at one of these points and a shipper using a spur track, the charge against the latter is discriminatory; it can not be doubted that a shipper on a spur track would willingly pay even more than the charge now exacted in order to avoid the liability to damage involved in loading and unloading a car on a team track and to save the larger cost of such handling by wagon. Nor is it necessary to inquire just how far the commerce of the three communities may be ad-
104 versely affected in their competition with other communities.

In my judgment, when no separation has been made, so far as their innumerable other stations are concerned, between the line haul and the "spotting" of cars on spur tracks, and no separate and additional charge for the latter service has been established, that principle in the general rate structures of these defendants can not lawfully be departed from at San Francisco, Los Angeles, and San Diego simply because, as one of the witnesses put it, the defendants are able easily to collect the charge at those great centers. The separation of the spur-track service, from what for convenience has been referred to as the line haul, and the extra charge therefor involve a principle of transportation. Such a charge in order to be justifiable at any point

must rest upon a general practice to impose it at all points. And I regard it as clearly unreasonable to impose the charge at these three points in the face of a general practice on the part of the defendants not to impose it at other points on their lines.

If the revenues derived by the defendants from the imposition of such a charge upon these three communities is unnecessary, in the sense that the total revenues otherwise derived from the conduct of their transportation are sufficient to meet the views hereinbefore expressed as to the income that carriers are reasonably entitled to have, then the additional charge, made at those points only, is unreasonable. On the other hand, if the amount of the revenues accruing from that source is required in order to yield the defendants the total revenues that they ought reasonably to have, it is wholly unreasonable to cast the entire burden on San Francisco, Los Angeles, and San Diego. It should in some form be distributed over the
105 entire lines of the defendants and not be imposed upon these three points alone.

Looking at the question from this point of view, I have no difficulty in holding that the charge made by these defendants at San Francisco, Los Angeles, and San Diego is both unreasonable and unduly discriminatory.

Knapp, chairman, dissenting:

I can not agree with the conclusions of the majority in this case and will briefly outline the grounds upon which I dissent. In my opinion, the order directed to be entered is unwarranted for two reasons: First, because the charge in question is not unlawful and therefore the commission is without authority to compel its discontinuance; second, because the order is not justified by the facts and circumstances disclosed by the investigation.

Manifestly the exaction of an additional switching charge for private or spur track delivery can not be condemned unless such charge violates some provision of the regulating statute. Inasmuch as the charge in controversy is made under definite and proper tariff authority, the commission has no power to require its elimination unless it contravenes one or more of the first three sections of the act.

To hold that this charge violates the first section involves a finding that it is either in and of itself unreasonable—that is to say, excessive in amount—or that the aggregate charges for line haul and switching are unreasonable, and there is no evidence to support such a finding. Taking complainant's own proofs as to the cost of this spur-track delivery, to say nothing in this connection of its superior value to the consignee, it is evidently not unreasonable for the service performed.

Indeed, the witnesses for complainant virtually conceded and
106 all the testimony shows that $2.50 per car is not excessive, if any charge whatever may be imposed. Moreover, the commission has repeatedly found that terminal rates to Los Angeles and other Pacific coast points are forced down by water competition to a lower basis than the defendants might lawfully exact, and there was really no pretence that the line rate plus the switching rate results in

unreasonably high charges for the entire transportation. To this it may be added that the complaint was not brought upon the theory, nor was the contention made at the hearing, that this switching charge is excessive in amount and ought to be reduced, but distinctly upon the theory that it is unlawful to make any charge for spur-track delivery in addition to the line rate which covers team-track delivery. The real point in controversy is not whether this charge of $2.50 a car is more than it ought to be but whether defendants have the right to make any charge whatever, and I do not perceive that the record presents a question of unreasonableness under the first section.

This charge does not violate the second section. It is not within the prohibition against "any special rate, rebate, drawback, or other device," nor can it be said that spur-track delivery to a private industry is "like" service with public team-track delivery. If this section is violated, the defendants are liable to indictment, and a criminal prosecution would be the appropriate proceeding. It certainly is not necessary and would hardly seem to be suitable for the commission to make an order requiring a carrier to cease and desist from a specific and clearly defined act which is a criminal misdemeanor if the charge in question violates the second section.

107 Nor does this charge violate the third section, on the showing now made. To say that the team-track consignee, who pays only the line rate but must incur the expense of cartage from the team track, is given "undue or unreasonable preference or advantage," and that the spur-track consignee, who pays $2.50 per car more and saves from two to at least four times that amount of cartage, is subjected to "undue or unreasonable prejudice or disadvantage," is so palpably at variance with the conceded facts in this case and with common experience and observation as not to admit of serious argument. Plainly, as between team-track consignees and spur-track consignees at Los Angeles there is absolutely nothing upon which the latter can predicate a violation of the third section. It may be that the exaction of this charge at Los Angeles, when no similar charge is imposed at other Pacific coast terminals, except San Francisco and San Diego, gives an unjust advantage to competing shippers at terminal points where spur-track delivery is made without additional charge. This aspect of the case was incidentally presented but was not made the subject of particular investigation. If it is really desired to base a claim for relief upon this ground the complainant is entitled to further hearing in order that the facts may be fully developed. I apprehend, however, that a finding of undue prejudice to Los Angeles shippers for this reason would warrant no more than an order to cease and desist from the ascertained discrimination, which would leave to defendants the choice of discontinuing the charge at Los Angeles or imposing it at competing points found to be unduly favored. That Los Angeles shippers are at a disadvantage because of this charge in competition with interior or eastern shippers has certainly not been shown and could not be seriously contended.

108 The majority report condemns this charge as "illegal and unjust." In my judgment this conclusion is untenable, because the charge is not illegal unless it violates some law which this commission does not administer and under which it can grant no relief. To hold that it is unjust, in view of the undisputed facts, is merely to declare the opinion that although not in contravention of the act it is a charge which in equity and good conscience ought not to be made; and this opinion would seem to rest mainly upon the finding that no extra charge for spur-track delivery appears to be made anywhere in the United States except at Los Angeles, San Francisco, and Diego. In other words, the custom which elsewhere prevails operates in some way to make the charge unlawful at the three places where it is imposed. But to my mind it is evident that the rights of carriers or shippers in respect of transportation charges subject to the regulating statute cannot be limited by custom or usage however prevalent or long continued. That field of commercial activity has been removed from the domain of the common law by legislative enactment. Besides, if evidence of usage is at all material or entitled to any consideration, the conceded custom at Los Angeles for more than twenty years would establish the rights of the respective parties in that community with as much binding effect as the custom at Portland, Seattle, or Kansas City would determine corresponding rights at those places. I am not aware of any theory by which the obligations of carriers or shippers can be measured by preponderance of custom, since it is elementary that the custom which makes law must be continuous and generally observed in the locality where the question of right arises.

109 Without reviewing the authorities in point it seems clear to me that spur-track delivery is a service which carriers are not bound to perform at common law. In the absence of statutory requirements carriers by rail comply fully with their legal obligations in respect of delivery of freight by making delivery of less than carload shipments at their established depots or stations, and of carload shipments upon the team tracks which they provide and maintain for the general public. Moreover, sidetracks and spurs running to private industries or warehouses of particular shippers are usually constructed, as was shown to be the fact in this case, under some contract arrangement. The construction and maintenance of such sidetracks and the delivery of cars thereon at the private warehouses of certain shippers is a special privilege or favor which carriers are under no obligation to grant either at common law or under the act to regulate commerce. The rate established by a railway company for transportation from city to city, or from station to station, provides for no more as a matter of law than general delivery at freight house or team track. Undoubtedly the carrier may, if it chooses to do so, render this additional service without extra compensation. But it is one thing to say that a carrier may perform such a service without charge and quite another thing to say that it must do so. Nor does the fact that carriers generally in other parts of the country furnish spur-track

service gratuitously deprive these defendants of their legal right to make a reasonable charge to consignees for a valuable service which in the absence of special contract they are not bound to perform.

Without attempting to decide whether these industry tracks in Los Angeles are a part of the defendants' terminals or strictly
110 private sidings, there is no question that the service performed for spur-track consignees is a different service from that performed for team-track consignees, and a much more valuable service. The testimony shows that cartage from team tracks to warehouses costs from $5 to $15 per carload, depending upon the distance hauled and the amount and character of the shipment. To say that the consignee who secures warehouse delivery of carload freight at a charge of from one-half to less than one-fourth of the cost of cartage from team tracks, does not receive a more valuable service than the team-track consignee is to contradict the whole record in this case and disregard results which are obvious and conceded. If a carrier may make different rates on different articles because of differences in value, although carried at the same cost, why may not a carrier make differences in rates on the same article, although carried at the same cost, because of differences in place and manner of delivery which makes one kind of delivery much more desirable and valuable than the other? Are not the convenience and conceded saving cheaply purchased? Does not the spur-track consignee in fact have an advantage over his team-track competitor, a direct pecuniary advantage, much greater than $2.50 a car?

It must, of course, be conceded that private contracts, even though valid when made, become unlawful to the extent that their operation results in violation of the act; but, nevertheless, in considering the merits of this case it is impossible for me to overlook the fact that the consignees represented by complainant voluntarily entered into contracts for the construction of these spur tracks and delivery thereon with full knowledge and expectation that they would be required to pay an extra charge of $2.50 per car for such delivery
111 and were apparently anxious, at least in most cases, to secure the service upon these terms; and I cannot escape the impression that their present effort to retain the benefits of spur-track connection and delivery, and yet deprive the defendants of one of the material considerations for making these agreements, is not altogether free from criticism. For example, it appears that the Santa Fe has spur-track connection with 166 industries at Los Angeles, more than half of which have located upon its tracks since 1905. Each of these concerns was perfectly aware before contracting for spur-track service that the extra charge from which exemption is now sought would be imposed and the arrangement was made with that understanding.

The suggestion in the concurring memorandum of Commissioner Prouty that these consignees have paid for this special service by contributing to the cost of constructing the spur tracks in question

does not seem to me to be supported by anything appearing in or fairly deducible from the record. It is evident from what does appear that different spurs represent great differences in cost of construction, and it is equally apparent that there are great differences in the value of spur-track delivery to different consignees, depending upon the number of cars received, the saving in cartage, and other circumstances. To say that the expense originally incurred by the shipper in securing spur-track delivery under the standard contract, whether that expense was much or little, must be regarded as compensation to the carrier for the indefinite future for performing the service of spur-track delivery, however great or valuable that service may be, appears to me an indefensible proposition.

There is one aspect of the matter which seems of considerable
112 importance, though perhaps without bearing upon the legal question involved, and that is the necessary effect of an order in accordance with the majority report in disturbing the present equality between all spur-track consignees in respect of the switching service in controversy. Under existing arrangements between the carriers each defendant switches to industries on its own spur tracks the cars which have reached Los Angeles over another line, with the result that every spur-track consignee within the switching district of Los Angeles, no matter with what line his warehouse is connected or over what line his traffic arrives, secures warehouse delivery at the uniform charge of $2.50 per car. This operates to put all consignees upon an equal footing and permits each to ship by any line, as may promote his convenience or advantage, and have delivery at the same cost. But if the order to be entered herein is enforced, the line bringing in the traffic must make delivery without extra charge on spur tracks connected with that line, while an additional charge must be paid, which may not be limited to $2.50 a car, to secure delivery on spur tracks connected with another line. How this will work out cannot, of course, be wholly foreseen, but it will necessarily produce more or less inequality and perhaps result, in some cases, in serious disadvantage.

For the reasons thus indicated, I disagree with the majority. I am convinced that an additional charge may lawfully be made for private-track or spur-track delivery, because it is a special service which the carrier is not required to perform and a service of distinct value to the consignee, as compared with team-track delivery, for which the carrier may rightfully exact compensation. The charge in this case is admittedly reasonable in amount and its imposition violates no law which the commission is appointed to administer. Upon the present record the complaint should be dismissed.

113 And on the same day, to wit, the first day of June, 1910, a certain chancery subpoena issued out of the clerk's office of the United States Circuit Court for the District of Kansas, First Division, addressed to the Interstate Commerce Commission, which said

subpoena, and the marshal's return of service thereof, are in the words and figures following, to wit:

Chancery subpoena.

114 UNITED STATES OF AMERICA, *District of Kansas, ss:*

The United States of America to the Interstate Commerce Commission, greeting:

We command you and every of you, that you appear before our judge of our Circuit Court of the United States of America for the District of Kansas, First Division, at the city of Topeka, in said district, on the first Monday in the month of July, next, to answer the bill of complainant of the Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company this day filed in the clerk's office of said court in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the District of Columbia to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this 1st day of June in the year of our Lord one thousand nine hundred and ten.

(The seal of the Circuit Court of the United States.)

G. F. SHARITT, *Clerk.*

Memorandum: The above-named defendant is notified that unless it enter its appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against it as confessed, and a decree entered accordingly.

G. F. SHARITT, *Clerk.*

115 (Endorsement:) No. 8887. Circuit Court United States, District of Kansas. The Atchison, Topeka and Santa Fe Railway Co. et al. vs. The Interstate Commerce Commission. Chancery subpoena. Returnable to rule day, first Monday in July, A. D. 189—. G. F. Sharitt, clerk. Filed Sept. 26, A. D. 1910. G. F. Sharitt, clerk. Robt. Dunlap, T. J. Norton, F. C. Dillard, W. R. Kelly, C. W. Durbrow, Compt's Sols. U. S. marshal's return. District of Columbia, ss. Received the within writ June the 4, 1910, and executed the same as follows, to wit: Served on the within named Interstate Commerce Commission, by service on Edward A. Moseley, secretary, June 4, 1910. Aulick Palmer, U. S. marshal. s.

116 And afterwards, to wit, on the 7th day of June, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, a certain certificate of the

Attorney General of the United States, in the words and figures following, to wit:

Expediting certificate.

117 In the Circuit Court of the United States for the District of Kansas, first division.

THE ATCHISON, TOPEKA AND SANTA FE RAILway Company; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In equity. No. .

To the clerk of said court:

I hereby certify that the above-entitled cause now pending in said court is a suit in equity brought by the Atchison, Topeka and Santa Fe Railway Company; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company against the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce" as amended by the act of June 29, 1906, and that said suit is, in my opinion, a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903; and in further compliance with the provisions contained in section 16 of the "act to regulate commerce," approved June
118 29, 1906, you will file this certificate among the records of the above-entitled cause, and immediately furnish a copy thereof to each of the circuit judges of the eighth circuit, to the end that said case shall be given precedence over other cases in said court and be assigned for hearing at the earliest practicable date before not less than three of the circuit judges of said circuit, as is provided by the said act of February 11, 1903.

WM. S. KENYON,
Acting Attorney General.

WASHINGTON, D. C., *June , 1910.*

119 And on June 10, 1910, there was filed and entered in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, a certain order, in the words and figures following, to wit:

Order fixing cause for hearing.

120 United States Circuit Court, District of Kansas.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND Southern Pacific Railroad Company
vs.
INTERSTATE COMMERCE COMMISSION.

It is hereby order that the hearing of this case, which was set for June 8, 1910, be, and the same is, continued to and fixed for hearing at St. Paul on October 12, 1910.

WALTER H. SANBORN,
U. S. Circuit Judge.

ST. PAUL, MINN., *June 6, 1910.*

121 And on the same day, to wit, the 10th day of June, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, in said cause, a certain order of the Interstate Commerce Commission, in the words and figures following, to wit:

Order of Interstate Commerce Commission.

122 At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of June, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

ASSOCIATED JOBBERS OF LOS ANGELES
v.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company. — No. 1704.

Upon further consideration of the record in the above-entitled case,

It is ordered that the order heretofore entered in said case, and by its terms made effective on July 1, 1910, be, and it is hereby, so modified as to become effective November 1, 1910, instead of on said July 1, 1910.

It is further ordered that a copy of this order be served upon each of the parties to this case.

A true copy.

E. A. MOSELEY, *Secretary.*

(Seal of Interstate Commerce Commission.)

123 And afterwards, to wit, on the 11th day of June, 1910, there was filed in the clerk's office of the United States Circuit Court

for the District of Kansas, first division, in said entitled cause, a certain appearance, in the words and figures following, to wit:

Appearance of P. J. Farrell.

124 In the Circuit Court of the United States within and for the District of Kansas, First Division.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company, complainants, v. THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. .

To the clerk of the court:

Please enter my appearance as solicitor for the Interstate Commerce Commission, the defendant in the above-entitled cause.

P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

125 And on the same day, to wit, the 11th day of June, 1910, came the defendant the Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, its certain answer, in the words and figures following, to wit:

126 In the Circuit Court of the United States within and for the District of Kansas, First Division.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company, complainants, v. THE INTERSTATE COMMERCE COMMISSION, defendant.	In equity, No. 8887.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, the defendant in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering paragraphs 1 to 4, inclusive, of the bill:

Defendant admits that the allegations contained in said paragraphs are true.

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II.

Answering paragraph 5 of the bill:

Defendant admits that the allegations contained in said paragraph are true, except that defendant denies that the team tracks and team-track facilities mentioned in said paragraph have been in the past, or are now, sufficient or adequate to fully accommodate the traffic transported in carloads in and out of the city of Los Angeles by the complainants.

III.

Answering paragraph 6 of the bill:

Defendant admits that the main tracks, team tracks, sheds, and buildings mentioned in said paragraph 5 of the bill constitute places established as depots or stations by the complainants, respectively, in said city of Los Angeles for the receipt, handling, and delivery of carload and less-than-carload freight, intrastate and interstate; disclaims information sufficient to form a belief as to whether or not said facilities are sufficient for the handling of double the amount of the freight which has been or is tendered to complainants upon said team tracks, at said sheds and said buildings, but defendant denies that said facilities are sufficient for the handling of double the amount of the freight which can be on any day so tendered; denies that the freight sheds and team tracks established and maintained by complainants at said Los Angeles for the receipt, handling, and delivery of carload freight are sufficient for all the carload
128 freight shipped into and out of said Los Angeles, including freight delivered on said team tracks and freight delivered on industrial tracks; disclaims information sufficient to form a belief as to whether or not each of the complainants in connection with its depots or stations has a considerable amount of vacant land upon which it can or will, as the requirements of the public may demand, place other sheds or team tracks; denies that there is no necessity in the proper conduct of complainant's business or in the rendering of proper services to shippers in said city to have or maintain the industrial tracks mentioned by complainants in their bill; disclaims information sufficient to form a belief as to whether or not said industrial tracks were constructed for the purposes enumerated by complainants in said paragraph 6, and denies that the undisputed evidence in the investigation had by defendant established the facts alleged by complainants in said paragraph 6.

IV.

Aswering paragraph 7 of the bill:

Defendant admits that the allegations contained in said paragraph are substantially true. In this connection, however, defendant alleges that the expense incurred in providing the side-track facilities mentioned in said paragraph was largely borne by the

shippers whose industries are accommodated by such facilities and that one of the principal reasons which prompted the complainants to assist in providing such facilities was a desire to obtain side
129 tracks and terminal facilities in Los Angeles which might be and are used by them in connection with the transportation of property other than that originating at or destined to said industries.

V.

Answering paragraphs 8, 9, 10, 11, 12, 13, and 14 of the bill:

Defendant admits that the allegations contained in said paragraphs are substantially true. In this connection, however, defendant alleges that the expense in each instance to complanants of transferring freight traffic from their main tracks to said industries or from said industries to their main tracks is no greater than the expense incurred by complainants in each instance in transferring freight traffic from said main tracks to complainants' team tracks or from said team tracks to said main tracks.

VI.

Answering paragraph 15 of the bill:

Defendant admits that the allegations contained in said paragraph are true, except that defendant denies that at the times special agreements pertaining to said side-track facilities were entered into by and between the complainants on the one hand and the shippers whose industries were and are accommodated by such facilities on the other hand, the latter willingly consented that if the complainants performed the services of transferring freight traffic from their main tracks to said industries and from said industries to said main
130 tracks they might in each instance make a charge for such services in addition to the charge made by them for transporting such freight to and from Los Angeles.

VII.

Answering paragraph 16 of the bill:

Defendant denies that at the hearing before it, referred to in said paragraph, the truth of the allegations contained in paragraph 15 of the bill was established by undisputed evidence or established at all, except to the extent of the admissions made by defendant in its answer to said paragraph 15.

VIII.

Answering paragraph 17 of the bill:

Defendant admits that the allegations contained in said paragraph are substantially true. In this connection, however, defendant alleges that the charge of $2.50 mentioned in said paragraph is in each instance applied to services performed by complainants which are

included in and covered by the rates exacted by complainants for transporting freight articles to and from Los Angeles, and that, therefore, such charge of $2.50 is unreasonable and unjust to the full extent thereof.

IX.

Answering paragraph 18 of the bill:

Defendant denies that in performing the switching service involved in the receipt and delivery of carload freight at the aforesaid
131 industries, complainants are put to a greater expense than would be necessary in performing the switching service involved in the receipt and delivery of carload freight on their team tracks or at their freight sheds.

X.

Answering paragraph 19 of the bill:

Defendant admits that complainants have made and established rates of transportation to and from Los Angeles from and to points on their respective lines and, in many cases, have made and established joint rates from and to points on many other railroads in the United States; admits that complainants have published and filed with defendant schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less-than-carload freight and for carload freight; disclaims information sufficient to form a belief as to whether or not complainants have duly posted said schedules or tariffs in their respective stations where freight is received by them; admits that in respect to less-than-carload freight said rates have been established and made to cover the receipt and delivery of such freight at the respective freight stations of complainants in Los Angeles; but alleges that neither the receipt nor the delivery of such less-than-carload freight by complainants, under said schedules, is restricted to said freight stations; admits that in respect to carload freight rates established by complainants for the public in general cover receipt and delivery upon and
132 at the team tracks and sheds of the respective complainants, but alleges that under said schedules neither such receipt nor such delivery by complainants is restricted to said team tracks and sheds, although defendant admits that in said schedules it has been and is stated that where carload freight is received at or delivered to private industries located upon industry tracks in Los Angeles a charge of $2.50 per car in addition to the rate to or from Los Angeles, as the case may be, will be charged and collected in each instance by complainants.

XI.

Answering paragraph 20 of the bill:

Defendant denies that on account of water competition or other competition the rates of transportation to and from Los Angeles

have been forced to an exceedingly low basis; denies that complainants do not receive for such transportation rates as great as the rates they are justly entitled to; admits that complainants ought not to be required or forced to perform the service of receiving or delivering goods at said industries in Los Angeles without reasonable reward and compensation for the services performed by them, but alleges that in each instance the rates exacted by complainants for transportation to and from Los Angeles, exclusive of said $2.50 charge, furnish to complainants such reward and compensation. Defendant disclaims information sufficient to form a belief as to whether or not water competition or other competition prevents complainants from charging and collecting as great rates for trans-
133 portation to and from Los Angeles as they would be able to charge and collect if such competition did not exist.

XII.

Answering paragraph 21 of the bill:

Defendant denies that complainants are not legally obliged to receive or deliver carload freight at any place in Los Angeles other than upon their team tracks or at their freight sheds, and denies that when complainants undertake to receive or deliver carload freight on tracks other than their team tracks or at places other than their freight sheds they are entitled to make a charge therefor in addition to the charge exacted by them for the transportation of said freight to or from Los Angeles, as the case may be.

XIII.

Answering paragraphs 22, 23, 24, 25, 26, and 27 of the bill:

Defendant admits that the allegations contained in said paragraphs are true, except that defendant denies that the shippers referred to in said paragraph 22 entered into a conspiracy or did any other wrongful act in connection with the complaint mentioned in said paragraph 22.

XIV.

Answering paragraph 28 of the bill:

Defendant denies that the order of defendant referred to in
134 paragraph 26 of the bill is unauthorized or erroneous; denies that said order was made by defendant under a misconception of law; denies that said order is unjust or unreasonable; denies that said order deprives complainants of reasonable or just compensation for the rendition of services which they are not obliged under the law to perform; denies that said order is based upon a misconception of facts; denies that the enforcement of said order will deprive complainants of just compensation for services rendered by them, or deprive complainants of their property without due process of law, and denies that said order is violative of the fifth amendment of the Constitution of the United States or beyond the power or authority of defendant to make.

XV.

Answering paragraph 29 of the bill:

Defendant denies that if said order should become effective it would compel complainants to perform the service of switching cars to or from industries in Los Angeles without reasonable compensation; admits that the number of cars switched annually by complainants in Los Angeles is large, but disclaims information sufficient to form a belief as to whether or not the enforcement of said order will reduce to the extent of $200,000 per year the revenue complainants would otherwise receive.

135

XVI.

Answering paragraph 30 of the bill:

Defendant believes the statements contained in said paragraph are and that each of said statements is irrelevant and immaterial; therefore, defendant neither admits nor denies that any of said statements is true. In this connection, however, defendant alleges that complainant may avoid the inconvenience and injury pictured in said paragraph by complying with the terms of said order.

XVII.

Answering paragraph 31 of the bill:

Defendant admits that unless said order is suspended or set aside by the court defendant will maintain same as an effective order and institute or suffer to be instituted for that purpose judicial proceedings, but defendant denies that such action on its part would be contrary to equity or good conscience or tend to the manifest wrong or injury of complainants.

Defendant denies every other matter, cause, or thing in the complainants' bill of complaint contained material or necessary for defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied.

All of which matters and things the said defendant is ready to aver, maintain, and prove as this honorable court shall direct,
136 and thereby prays to be hence dismissed with its reasonable costs and charges in that behalf sustained.

THE INTERSTATE COMMERCE COMMISSION,
By EDWARD A. MOSELEY,
Secretary thereof, thereunto duly authorized.
W. S. KENYON,
Assistant to the Attorney General, Washington, D. C.,
HARRY J. BONE,
United States Attorney, Topeka, Kans.,
P. J. FARRELL,
Special Assistant United States Attorney,
Washington, D. C.,
Solicitors for Interstate Commerce Commission.

137 WASHINGTON, *District of Columbia, ss:*

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, having read the foregoing answer and knowing the contents thereof, hereby make oath that the matters of fact therein stated are true to the best of my knowledge, information, and belief.

EDWARD A. MOSELEY,
Secretary of the Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this the 7th day of June, 1910.

[L. S.]

H. S. MILSTEAD,
Notary Public.

138 And afterwards, to wit, on the 4th day of July, 1910, came the complainants in said entitled cause, by their solicitors, and filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, their certain replication to answer, in the words and figures following, to wit:

139 (Copy.)

In the Circuit Court of the United States within and for the District of Kansas, first division.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; and SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. 8887.

Replication to answer.

These repliants, The Atchison, Topeka and Santa Fe Railway Company; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the Interstate Commerce Commission for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these repliants; without that, that any other matter or thing in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things these repliants are ready to aver, maintain, and

prove as this honorable court shall direct and humbly pray as in and by their said bill they have already prayed.

ROBERT DUNLAP,
T. J. NORTON,
F. C. DILLARD,
W. R. KELLY,
C. W. DURBROW,
P. F. DUNNE,
Solicitors for Complainants.

GARDINER LATHROP,
W. F. HERRIN,
Of Counsel.

140 And afterwards, to wit, on the 29th day of October, 1910, there was filed in the clerk's office of the United States Circuit Court for the District of Kansas, first division, in said entitled cause, a certain stipulation, in the words and figures following, to wit:

Stipulation to transfer cause to United States Commerce Court.

141 In the Circuit Court of the United States within and for the District of Kansas, first division.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company, complainants, vs. INTERSTATE COMMERCE COMMISSION, DEFENDANT.	In Equity. No. 8887.

Stipulation.

It is hereby stipulated and agreed between the parties to the above cause that the same shall be removed or transferred under the act of June 18, 1910, to the Commerce Court of the United States as soon as said court shall be organized, and that in the meantime no evidence need be taken for the final hearing of the cause under the equity rules by either party while said cause shall be pending in the United States Circuit Court, but that evidence for the final hearing may be taken after the removal of said cause to said Commerce Court and in accordance with the procedure and practice prescribed by said court.

ROBERT DUNLAP,
T. J. NORTON,
F. C. DILLARD,
W. R. KELLY,
C. W. DURBROW,
P. F. DUNNE,
Solicitors for Complainants.
W. S. KENYON,
HARRY J. BONE,
P. J. FARRELL,
Solicitors for Defendant.

142 And afterwards, to wit, on the 20th day of December, 1910, there was filed and entered in the clerk's office of the United States Circuit Court for the District of Kansas, first division, in said entitled cause, a certain order, in the words and figures following, to wit:

Order.

143 In the Circuit Court of the United States within and for the District of Kansas, first division.

THE ATCHISON, TOPEKA AND SANTA FE Railway Company et al, complainants, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. 8887.

Order transferring cause to the Commerce Court.

In pursuance of the stipulation filed in the above cause and of the provisions of the act approved June 18, 1910, it is hereby ordered that the above case be transferred to the Commerce Court of the United States, and that immediately upon the organization of said court the clerk of this court shall transmit to and file in the said Commerce Court the originals of all papers filed in the above cause and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

JOHN C. POLLOCK, *Judge.*

144 And afterwards, to wit, on the 24th day of February, 1911, there was filed in the clerk's office of the United States Commerce Court in said entitled cause a certain petition of intervention in the words and figures following, to wit:

Intervening petition of the Pacific Coast Jobbers & Manufacturers' Association.

145 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company *vs.* THE INTERSTATE COMMERCE COMMISSION.	In Equity. No. 2.

Petition of intervention.

To the honorable judges of the United States Commerce Court:

Your petitioner, the Pacific Coast Jobbers' and Manufacturers' Association, a voluntary unincorporated association, by its solicitor, Seth Mann, respectfully shows as follows:

That said association is a voluntary association of individuals, firms, and corporations, organized for the promotion and defense of

wholesale and manufacturing interests on the Pacific coast. That said association was the complainant before the Interstate Commerce Commission in a proceeding in which said commission made an order, dated April 11, 1910, which order is the basis of the suit pending in this court entitled Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company vs. The Interstate Commerce Commission, in Equity No. 1, and your petitioner has filed in said suit its petition of intervention. That the above-entitled suit is based upon an order of the Interstate Commerce Commission, dated on or about the 11th day of April, 1911, which said order is to all intents and purposes the same as the order which forms the basis of the said suit designated in this court as in equity No. 1, except that said order involved in the above-entitled suit pertains to the city of Los Angeles, whereas, the order involved in the said suit numbered in Equity No. 1 pertains to the city of San Francisco. That
146 the facts involved in both of said cases are similar and the principles involved are the same, and your petitioner is accordingly interested in the above-entitled suit.

That said order involved in the above-entitled suit, to which reference is hereby specially made, is set forth on pages 16 and 17 of the bill in said suit.

Wherefore, your petitioner prays that it may be made a party to said suit and be allowed to participate therein, and be entitled to notice of all proceedings pertaining thereto in the same manner and to the same extent as though named as such party at the time said suit was instituted in court.

Dated: San Francisco, California, March 6, 1911.

PACIFIC COAST JOBBERS' AND MANUFACTURERS' ASSOCIATION,
By SETH MANN, *Its Solicitor.*

SETH MANN,
1203 Merchants' Exchange Building, San Francisco, California, Counsel for Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Eugene Goodwin, being first duly sworn according to law, deposes and says that he is the secretary of Pacific Coast Jobbers' and Manufacturers' Association, the petitioner in the foregoing petition for intervention; that he knows the facts stated therein and that the statements therein are true.

EUGENE GOODWIN.

Subscribed and sworn to before me this 6th day of March, 1911.

(Notarial seal.) CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

147 (Endorsed:) Service of copy of within petition of intervention admitted this 11th day of March, 1911. E. W. Camp, A., T. & S. F. C. W. Durbrow, for S. P. A. L. Halsted, for Salt Lake. P. J. Farrell, for I. C. C.

148 And afterwards, to wit, on the 18th day of March, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

Motion of Interstate Commerce Commission.

149 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company, *v.* INTERSTATE COMMERCE COMMISSION.	In equity. No. 2.

Motion.

Comes now the Interstate Commerce Commission, the defendant in the above-entitled suit, by P. J. Farrell, its solicitor, and moves this honorable court to proceed to final determination of the issues involved in said suit without receiving testimony or other evidence, and in support of said motion shows: That every material allegation contained in the bill of complaint of the above-named complainants is admitted in the answer of this defendant to said bill.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Defendant.

150 And afterwards, to wit, on the 3d day of April, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain petition of intervention, in the words and figures following, to wit:

151 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company, *v.* THE INTERSTATE COMMERCE COMMISSION.	In Equity. No. 2.

Petition of intervention of the Associated Jobbers of Los Angeles.

To the honorable judges of the United States Commerce Court:

Your petitioner, the Associated Jobbers of Los Angeles, a voluntary, unincorporated association, by its solicitor, Seth Mann, respectfully represents that the above-entitled suit is based upon an order of the Interstate Commerce Commission, dated on or about the

11th day of April, 1910, made and entered in a proceeding then pending before the commission wherein your petitioner was the complainant; that your petitioner is interested in said suit and order, and that said order, to which reference is hereby made, is set forth on pages 16 and 17 of the bill in said suit.

Wherefore your petitioner prays that it may be made a party to said suit and be allowed to participate therein and be entitled to notice of all proceedings pertaining hereto in the same manner and to the same extent as though named as such party at the time said suit was instituted in said court.

152 Two.

Dated at Washington, D. C., April 3d, 1911.

Associated Jobbers of Los Angeles, by Seth Mann, its solicitor.

Seth Mann, 1203 Merchants' Exchange Building, San Francisco, Cal., counsel for petitioner.

WASHINGTON, *District of Columbia, ss:*

Seth Mann, being first duly sworn, says that he is the solicitor of the Associated Jobbers of Los Angeles, the petitioner in the foregoing petition for intervention; that he knows the facts stated in said petition, and that the same are true.

SETH MANN.

Subscribed and sworn to before me, G. F. Snyder, a notary public in and for said District of Columbia, this 3d day of April, 1911.

(Notarial seal.) G. F. SNYDER,
Notary Public.

My commission expires February 14, 1913.

153 (Endorsed:) Service of copy of within petition of intervention is admitted this 3rd day of April, 1911. Robert Dunlap, T. J. Norton, F. C. Dillard, H. A. Scandrett, A. L. Halsted, P. F. Dunne, C. W. Durbrow, solicitors for complainant. P. J. Farrell, solicitor for I. C. C. J. A. Fowler, for the United States.

154 And on the same day, to wit, the 3d day of April, 1911, there were filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, two certain orders, in the words and figures following, to wit:

Orders granting leave to intervene.

155 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RY. CO., SOUTHERN PACIFIC CO., and SAN PEDRO, LOS ANGELES & SALT LAKE R. R. CO., petitioners, *vs.* INTERSTATE COMMERCE COMMISSION, RESPONDENT.	No. 2.

In this cause the United States moves the court that it be permitted to intervene and to become a party defendant; and it appearing to

the court that the cause involves public interests, the motion is allowed, and the United States is made a party defendant accordingly, and it is granted thirty days within which to make defense, either by motion or answer, but defense shall be made in such time as not to delay a hearing of the cause.

156 In the United States Commerce Court.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, Topeka & Santa Fe Railway Co., petitioners, *vs.* INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 1.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., petitioners, *vs.* INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 2.

On motion of counsel it is ordered in said causes: That the Pacific Coast Jobbers and Manufacturers' Association and the Associated Jobbers of Los Angeles be permitted to intervene and to become parties respondent, in accordance with petitions filed in writing, provided that such intervention shall not delay a hearing of the causes.

157 Extract from journal of United States Commerce Court, proceedings of April 3, 1911.

SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS, *vs.* INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 1.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., petitioners, *vs.* INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 2.

Said causes came on for hearing before the court on the motion of the Interstate Commerce Commission to proceed to final determination of the issues involved without receiving the testimony and other evidence, Mr. P. J. Farrell appearing in behalf of the Interstate Commerce Commission, and Messrs. Robert Dunlap and C. W. Durbrow in behalf of the petitioners. Thereupon further consideration of said causes was postponed, upon the application of Honorable James A. Fowler, Assistant Attorney General of the United States, in order to give him opportunity to file a motion on behalf of the United States.

158 And afterwards, to wit, on the 5th day of April, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

Motion of the United States to dismiss.

159 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., SOUTHERN Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Co., petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.
No. 2.

Motion to dismiss.

The Attorney General of the United States, in behalf of the United States, moves that this cause be dismissed for the following reasons:

I.

The petition and the exhibits thereto show that, at the instance of an association representing the shippers interested in the matter, the Interstate Commerce Commission had a regular hearing and investigation; that it had full jurisdiction over each and every question considered and determined by it; that, after such hearing, the commission found and reported a conclusion, upon which the order attacked is based, that the industrial sidetracks, for the placing of cars upon which petitioners charge shippers $2.50 per car, are, in fact, but a portion of petitioners' terminal facilities in the city of Los Angeles; that in this respect they bear the same relation to petitioners' lines of road as the team tracks, for the placing of cars upon which petitioners charge nothing; that the service rendered in setting cars upon said tracks is not an additional service justifying an additional charge, but is a service paid for in the payment of charges for transportation; and that the charge of $2.50 per car for setting cars upon said industrial tracks, in addition to the charges for trans-
160 portation under petitioners' rates as a whole, is unreasonable and unjust.

II.

The petition and exhibits thereto show that the Interstate Commerce Commission, at the instance of an association representing the shippers, had a regular hearing and investigation, as aforesaid; that it had full jurisdiction over every question considered and deter-

mined, as aforesaid; that after said hearing they reported a conclusion, as aforesaid, that the industrial sidetracks are but a part of petitioners' terminal facilities in Los Angeles, and in that respect bear the same relation to petitioners' lines of road as the team tracks, as aforesaid; that the service rendered in setting the cars upon said tracks is not an additional service, but is a service paid for in the payment of charges for transportation, as aforesaid; that for the same service in many other cities, the merchants and producers of which directly compete with the merchants and producers of Los Angeles, petitioners make no charges; and that the charging of said $2.50 per car constitutes an unjust and unreasonable regulation and practice.

III.

The petition and exhibits thereto show that the Interstate Commerce Commission, at the instance of an association representing the shippers, had a regular hearing and investigation, as aforesaid; that it had jurisdiction of every question considered and determined, as aforesaid; that after said hearing they reported a conclusion, as aforesaid, that the industrial sidetracks are but a part of petitioners' terminal facilities in the city of Los Angeles, and in that respect bear the same relation to petitioners' lines of road as the team tracks, as aforesaid; that the service rendered in setting the cars upon said tracks is not an additional service, but is a service paid for in the payment of charges for transportation, as aforesaid; that for
161 the same service in many other cities, the merchants and producers of which directly compete with the merchants and producers of Los Angeles, petitioners make no charges; and that the charging of said $2.50 per car is unjustly discriminatory, and is unjustly preferential and prejudicial against those from whom said charge is exacted.

IV.

The petition and exhibits thereto fail to show that the order of the commission attacked in the petition will, if enforced, deprive petitioners of their property without due process of law or without just compensation, within the meaning of the fifth amendment to the Constitution of the United States.

Wherefore, and for divers other good causes appearing in the petition and exhibits thereto, this defendant moves that the cause be dismissed and prays the judgment of the court whether it shall be compelled to make answer to the petition, and that it be hence dismissed.

GEO. W. WICKERSHAM,
Attorney General of the United States.

162 Extract from journal of United States Commerce Court. Proceedings of April 10, 1911.

SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS,
vs. No. 1.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT; PACIFIC COAST JOBBERS & MANUFACTURERS' ASSO. AND ASSOCIATED JOBBERS OF LOS ANGELES, interveners. No. 2.

In said causes it was *Ordered:* That the report and order of the Interstate Commerce Commission in the Los Angeles case be deemed a part of the record in the San Francisco case.

Said causes came on for hearing before the court, on the motions of the United States to dismiss the petitions, Hon. James A. Fowler appearing on behalf of the United States, and Mr. Seth Mann on behalf of the interveners.

163 Extract from journal of United States Commerce Court. Proceedings of April 11, 1911.

SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS,
vs. No. 1.
INTERSTATE COMMERCE COMMISSION, RESPONDENT.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT; PACIFIC COAST JOBBERS & MANUFACTURERS' ASSO. AND ASSOCIATED JOBBERS OF LOS ANGELES, interveners. No. 2.

Said causes came on for further hearing before the court upon the motions to dismiss, and the arguments of counsel were concluded, Mr. Seth Mann appearing in behalf of the interveners, Messrs. Robert Dunlap and H. A. Scandrett in behalf of the petitioners, and Mr. P. J. Farrell in behalf of the Interstate Commerce Commission. Thereupon said causes were taken under advisement by the court.

164 And afterwards, to wit, on the 20th day of July, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain opinion, in the words and figures following, to wit:

Opinion.

165 United States Commerce Court. No. 2. April session, 1911.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,
v.
INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, respondents.

Robert Dunlap, T. J. Norton, F. C. Dillard, H. A. Scandrett, and C. W. Durbrow, solicitors for petitioners.

Gardner Lathrop and W. F. Herrin, of counsel.

J. A. Fowler, Assistant Attorney General; Blackburn Esterline, Special Assistant Attorney General; and P. J. Farrell, Solicitor for Interstate Commerce Commission, for respondent.

Seth Mann for interveners.

[July 20, 1911.]

CARLAND, Judge:

This case has been submitted upon a motion for a temporary injunction made by the petitioners, and upon a motion to dismiss made by the United States and the Interstate Commerce Commission. The motion to dismiss is made by virtue of the provisions of section 1 of the act to create a Commerce Court, which allows such a motion to be made where it is claimed the petition does not set forth a cause of action. As determinative of these motions, our view is necessarily limited to the facts, which are well pleaded in the petition. These facts, as they appear in the petition, are substantially as follows:

The petitioners are railroad corporations, organized under the laws of the States of Kansas, Kentucky, and Utah, respectively. At all times each of said petitioners and their respective predecessors in interest have maintained and do now maintain public freight depot buildings theretofore, respectively, established by them in said city of Los Angeles upon or adjacent to their respective tracks connecting with their respective main tracks in said city where freight in less than carload lots is and has been received for transportation for shippers in said city destined to various points upon their respective lines of railroad or points upon connecting lines of railroad in the United States, and where such freight transported from various points to Los Angeles is delivered to the owners or consignees thereof.

166 Each of said petitioners and their respective predecessors in interest have also located and established and have maintained and do now maintain what are known as "team tracks" and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in

general for the loading therein of carload freight for transportation to various points upon their respective lines of railroad in the United States, and where also is set and placed for the unloading thereof by consignees or owners in said city, who have not been favored with the private or special sidetrack facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere to such owners or consignees in said city of Los Angeles; and said team tracks and freight sheds are so connected with the respective main line tracks of the petitioners in said city that cars loaded with carload freight may be readily transferred from said main line tracks to said team tracks and sheds; and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said team tracks and freight sheds constitute and have constituted the places where the respective petitioners receive and have heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of Los Angeles; and the same are and have been in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds, and buildings above shown constitute the places established as depots or stations by each of the petitioners in said city of Los Angeles for the receipt, handling, and delivery of carload and less than carload freight intrastate and interstate. Said facilities so established and maintained for the receipt, handling, and delivery of less than carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or at any day can be tendered. The freight sheds and team tracks established and maintained for the receipt, handling, and delivery of carload freight are sufficient to handle all the carload freight coming into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of carloads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all carload freight can be received, handled, and delivered. In addition to this each of petitioners has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team trancks; so that there is no necessity in the proper conduct of petitioners' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of
167 certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of

cartage, which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth.

Each of the petitioners, as well as their respective predecessors in interest, have heretofore severally or individually entered into contracts or agreements with certain individual shippers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of spur tracks from the respective plant or industry in said city to and connecting with the yard tracks of the respective petitioners in said city where trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company and a part by such shipper. But such tracks were constructed especially to accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective petitioners carload freight consigned to or shipped by the owner or operator of said plant, and therefrom and thereby the owner or operator of such plant or industry located upon such spur or side track was relieved from the necessity of transferring carload freight to and from said team tracks and from or to such plant or industry by dray or wagon at a higher cost and greater risk; and that the shipper at such industry or plant by reason of such side-track facilities is given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks.

In such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years, usually less than five, a spur track to connect such plant or industry with the railroad of the railway company. But in such contracts it was generally provided that while the railway company might make use of the proposed track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such plant or industry but that the traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

In the contracts made by the Southern Pacific Co. covering the construction and maintenance of such industrial or spur tracks it was generally provided, among other things, as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Co.), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Co., and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Co., whether in original construction or by any way of replace-

ments or repairs, shall be and remain exclusive property of Southern Pacific Co., and said Southern Pacific Co. shall keep said track in repair.

168 "4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Co. may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Co., provided rate of charge shall be as low as that from or to point in question by any other rail route."

The contracts made for such purposes by the Atchison, Topeka & Sante Fe Railway Co. contained among other things the following provisions:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

The contracts made by the San Pedro, Los Angeles & Salt Lake Railroad Co. covering the cost and maintenance of such spur or industrial tracks contained provisions similar to those of the Southern Pacific Co. above set forth.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract, as aforesaid, by the Atchison, Topeka & Santa Fe Railway Co., or its predecessors in interest, in said city of Los Angeles, are distant from its main track in said city anywhere from one-fifth to 1½ miles, and in order to receive a carload of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of the said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must be then switched over such spur track and to the yard tracks to be placed in an appropriate tran for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in the said city of Los Angeles located upon the spur tracks heretofore constructed under contract as aforesaid by the Southern Pacific Co. or its predecessor in interest in said city of Los Angeles are distant from its main track in said city anywhere from 200 feet to 7 miles, and in order to receive a carload of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner an empty car and set the same at such industry where the same can be con-
169 veniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the San Pedro, Los Angeles & Salt Lake Railroad Co. in said city are distant from its main track in said city anywhere from one-fifth to 4 miles, and in order to receive a carload of freight from said plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur track to the industry or plant in question and to place the same convenient thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

In such contracts governing the construction and maintenance of such industrial tracks no specific sum was fixed or prescribed in case the railway company should perform the aforesaid special service of receiving or delivering freight at the plant or industry in question, but at the time of executing such contract the usual charge separately and specially set forth in the respective tariffs of petitioners for making such special deliveries or such special receipt of such carload freight, involving the switching service to and from such plant or industry from and to the yards of respective petitioners where trains are made or broken up, had been generally established by each petitioner at the sum or price of $2.50 per car, and had for many years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements, shippers entering into the

same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angeles would be made, and such charge of $2.50 per car has generally been made, maintained and collected from said shippers in Los Angeles for said special service as aforesaid.

The aforesaid service heretofore rendered by the respective railway companies of receiving carload freight at said industries or delivering the same to such industries or plants instead of at the team tracks or sheds is of great value to the owners or operators of such industries or plants and is worth much more than the sum of $2.50 per car inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges
170 which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have been thus favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into. The general or prevailing charge for drayage in Los Angeles is 50 cents a ton, which makes the cost to the consignee $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed by petitioners for delivering the consignment to or receiving the shipment at the door of the consignee's or shipper's warehouse.

In performing said special switching service involved in the receipt and delivery of carload freight at such industry or plant, petitioners are put to a much greater expense than if such freight was received or delivered on its team tracks or at its freight sheds.

Each of petitioners has made and established its rates of transportation to and from said city of Los Angeles from and to such points on their respective lines, and in many instances joint rates from and to points on many other railroads in the United States; they have duly published and filed with the Interstate Commerce Commission and posted in their respective stations where freight is received their respective schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less than carload lots and for carload freight; and in respect to less than carload freight the rates have been established and made to cover the receipt or delivery of such freight at the freight station of the respective railway company in said city; and in respect to carload freight rates established for the public in general contemplate receipt or delivery thereof upon or at the team tracks or sheds of the respective railway company; and in said tariffs it has been and is distinctly and separately provided and stated that where carload freight is received at or delivered to private industries located upon such industry tracks in said city of Los Angeles an additional charge—that is, a charge in

addition to the rate fixed to and from Los Angeles, amounting to $2.50 per car—will be charged and collected for said special service of making delivery or receipt of carload freight to or at said plants or industries located in said city of Los Angeles upon such special industry tracks.

On account of water and other competition the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that petitioners do not receive for such transportation sums which they are justly entitled to and which they would otherwise be able to charge and collect.

On or about April 5, 1910, the Interstate Commerce Commission, having investigated the complaint of the Associated Jobbers of Los Angeles against petitioners wherein said charge of $2.50 per car was claimed to be unjust and illegal, made the following order:

"This case being at issue on complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report
171 containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

Petitioners complain that said order deprives them of all compensation for the said special services so rendered by them respectively, and that said order is by reason thereof illegal and void. The petition prays that said order be annulled and that the Interstate Commerce Commission be perpetually enjoined from the enforcement thereof.

Whether or not the facts stated in the petition constitute a cause of action depends upon the question whether the petitioners have the lawful right to make the charge of $2.50 per car for the industrial track service mentioned. In the absence of special contract or usage to the contrary, under the common law carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. This rule, however, never was applied to railroads. They are exempt from the duty of personal delivery, and bound only to carry the goods to the depot or station to which they are destined and there hold or place them in a warehouse ready for delivery whenever the consignee or owner calls for them, after notifying the consignee or owner of their readiness to deliver.

Fenner v. Buffalo, etc., R. Co., 44 N. Y., 505.
Whitbeck v. Holland, 45 N. Y., 13.
Chalk v. Charlotte, etc., R. Co., 85 N. C., 423.
South, etc., Alabama R. Co. v. Wood, 66 Ala., 167.
New Orleans, etc., R. Co. v. Tyson, 46 Miss., 729.
State v. Republican Valley R. Co., 17 Nebr., 617.
Francis v. Dubuque, etc., R. Co., 25 Iowa, 60.
Evershed v. London, etc., R. Co., 2 Q. B. Div., 254.

The order of the Interstate Commerce Commission complained of makes the report of the commission a part thereof and as said
172 order is set out in the petition the report also becomes a part of said petition. It is found in the order of the commission that the charge of $2.50 per car, exacted by the several petitioners for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul is in violation of the act to regulate commerce. This conclusion is a conclusion of law and of course is open to inquiry in this court. It is not stated in the order itself what particular section of the act to regulate commerce the charge of $2.50 per car for the services rendered by petitioners violates. In this examination we are limited to the report or opinion of the majority of the commission, the views of the minority not being open to consideration. (Interstate Commerce Commission v. Delaware, L. & W. R. R. Co., 220 U. S., 235.)

In the report of the commission we find the following language (18 I. C. C. Rep., 310):

"The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations both of these contentions are sound."

Again, it is said in the report, as follows:

"We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal

facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers."

It is also stated in said report:

"We do not find in the record sufficient data upon which to base a finding as to the reasonableness of the amount of this charge of $2.50 for interline switching to these industrial tracks, and for the purpose of this present order will assume it to be reasonable."

Again, quoting from the report:

"The service here under consideration, however, is a delivery service and nothing more, the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle."

173 The commission condemned the charge of $2.50 per car made by the petitioners for delivering and receiving interstate carload freight to and from industries located upon spurs or sidetracks within their respective switching limits when such carload freight was moving incidentally to a system-line haul as illegal and unjust. As the commission did not find the charge of $2.50 to be excessive in and of itself, we conclude that the commission found that the charge violated section 1 of the act to regulate commerce, the charge being unjust because on the theory of the report of the commission the carrier had already been paid for this service by payment of the regular tariff from point of origin to destination.

It is claimed by counsel for the United States, under the decisions of the Supreme Court in Interstate Commerce Commission v. Illinois Central R. R. Co. (215 U. S., 415); Baltimore & Ohio R. R. Co. v. Pitcairn (215 U. S., 481); and Interstate Commerce Commission v. Delaware, L. & W. Ry. Co. (219 U. S., ——), that the findings thus made by the commission are conclusive upon this court, and that these findings forming a part of the petition, it conclusively appears therefrom that no cause of action has been stated which would warrant this court, taking all the allegations of the petition as true, in granting the relief prayed for. We are not unmindful of the rulings of the Supreme Court in the cases mentioned in regard to the force and effect to be given to the findings of the commission and have no disposition in any way to avoid the binding force of such rulings. We think that it is fair to say that the conclusion of the commission that the charge of $2.50 per car for the service named was illegal and

unjust was based upon two findings: First, that the industrial track upon which the service was rendered is a terminal facility of the railroad and not a plant facility of the industry to which it leads; and, second, that the service for which the charge is made is the same service as that which is performed by the carrier in delivering freight at its depot or team tracks.

We do not think that whether the industrial track is a plant facility or a terminal facility of the railroad necessarily determines the legality of the charge. The commission in one part of its report found that the contentions of both parties within certain limits were sound. The real question presented is: "Is the carrier lawfully entitled to charge the sum of $2.50 per car for the service performed upon the industrial tracks?" And we do not think that question can be determined alone by the consideration whether the industrial track is a plant facility or a terminal facility of the railroad, for the reason that it is the service which is performed upon the industrial track that is the question, regardless of the ownership of the track.

So far as the finding of the commission that the industrial track service is the same as the team track or depot service is concerned, we are constrained to hold that it is not a finding which precludes this court from coming to a different conclusion upon the present record. In cases where there is a substantial conflict in the evidence or testimony upon which a finding of the commission is based, we would feel bound by the finding unless clearly and palpably against the weight of the testimony; but we do not think that this court is concluded by a finding of the commission based upon admitted facts
174 which in no wise tend to sustain the conclusion reached. In other words, as in this case, where all the facts are undisputed, we do not think that the commission can by an ultimate finding based upon the undisputed facts preclude this court from reaching a conclusion of its own upon such undisputed and admitted facts. Where the facts are undisputed there is no occasion for facts to be found, and the ultimate conclusion of the commission is a mixed question of law and fact which certainly ought not to be held to be conclusive upon this court.

To say that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to 7 miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, is so contrary to the admitted physical facts as to be wholly untenable. It seems clear to us that in the absence of statute the carriers in the present case are not bound to perform this industrial track service, and if they voluntarily perform it under an arrangement with the owner of the industrial plant we see no reason why they may not charge a reasonable price therefor, and the charge in question is conceded to be reasonable.

We are not at liberty to view the case at this time except as it appears from the petition, and we are wholly unable to come to the

conclusion from the facts therein stated, which are to be taken as admitted for the purpose of this motion, that the industrial or spur track service is the same service that the carrier performs by delivery to the team track or at the depot, and therefore are unable to say that the general tariff charge on freight shipped to Los Angeles from points of origin would include a delivery at the industrial plant. Nor are we able to see how it can be said that the general tariff charge includes a delivery at the industrial plant. When it is said that the general tariff charge for the transportation of freight to Los Angeles pays for the delivery of such freight at the industrial plant, upon what authority is this declaration made? Who is to say that it pays for delivery at the industrial plant? The carrier, in the first instance, is entitled to fix its tariff charges for the transportation of freight, and in this instance has fixed a certain tariff for the delivery of freight to Los Angeles. At the same time that it fixed this general tariff it fixed a tariff, which it filed with the Interstate Commerce Commission, for this industrial track service, so that the only party in the first instance that had anything to say about what the general tariff charge should be was the carrier, and it has said that the general tariff charge only carries the freight to the depot or the team tracks. There is no evidence whatever that the carrier ever waived in any way its right to charge for the special service on the industrial tracks. There may be conditions under which the carrier may waive its right to make a charge for terminal service, as was said in Interstate Commerce Commission v. Stickney (215 U. S., 105):

"The carrier is under no obligation to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The petition in the present case shows that before these tracks were constructed this charge was contained in the general tariffs of
175 petitioners and that said charge for industrial track service was known to the different proprietors and owners of industrial plants and that they consented to such charge. It is admitted, of course, that such consent or implied contract on the part of the industrial plant owners would be avoided if it was in conflict with any law of Congress regulating interstate commerce. If the carrier is not bound by law to deliver freight at the industrial plant, and it can not be successfully contended that it is, then it follows as a necessary consequence that this industrial track service is a special service and is not a service which the carrier is bound to perform for the general tariff charge for the transportation of freight destined to Los Angeles.

The commission made no finding that the charge of $2.50 in connection with the transportation of cars to and from industrial plants constituted an undue preference or advantage or was discriminatory in any way, and these questions if they exist at all will not be discussed.

From what has been stated in this opinion as the views of this court, it necessarily results that the motion to dismiss must be denied, and an order will be granted suspending the order of the Interstate Commerce Commission complained of until the further order of this court.

Mack, Judge, dissents.

176 THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro Los Angeles & Salt Lake Railroad Company, petitioners, v. INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, respondents. } # 2.

Mack, J., dissenting:

In my opinion the finding of the commission, that the industry-track service in the city of Los Angeles is substantially the same as the team-track and depot service, is binding upon this court. I agree that this court should not be concluded by a finding of the commission, based upon admitted facts which in no wise tend to sustain the conclusion reached, but in my judgment the facts in this case, as related by the commission in its report, fully justify its conclusions. The commission finds as follows:

"Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in car loads is delivered at team tracks, at freight sheds, or at industry spurs. * * *

"These industry spurs are not private in that the carrier may use them for purposes of its own, as for storage of cars, as leads to other industries, and sometimes for public delivery. They are often laid upon public streets and over private property, are operated exclusively by the railroad with its own engines, and furnish means of interindustry conveyance by rail, for which the carrier properly imposes a switching charge. * * *

"We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect and, together with the team tracks and other yards, form the terminal facilities of these carriers. * * *

"Again, it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up
177 yards, which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the

various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. * * * After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery."

If, then, these industry tracks are, as the commission in my judgment correctly finds them to be, terminal facilities of the railroad, and if, as the commission further finds, the service for which the charge in question is made is substantially the same service as that which is performed by the carrier in delivering freight on its team tracks, the commission was justified in prohibiting, as an unreasonable practice, the additional so-called switching charge made for the delivery at the industry tracks.

While under the American practice, as distinguished from the English practice, the transportation rate has always included the charge for the use of the ordinary terminal facilities—that is, the use of depots or tracks for the purpose of delivery—it may well be that the commission has the right, in regulating the practices of the carriers, to require a separation of the transportation rate into its elements. It may well be that the dangers of undue preferences and unjust discriminations in favor of large industries, which can afford to have industry tracks, may not only justify but in the future require the commission so to act, and that, too, despite the common-law principle enunciated in Covington Stock Yards v. Keith, 139 U. S., 128, and conceded in complainant's brief in the following language:

"Of course, it may rightfully be assumed that the charge established by the carrier for carrying goods to and from the given
178 cities does necessarily embrace the use of instrumentalities which the carrier must furnish to accomplish the carriage, such as engine, cars, the railroad and the depots and delivering yards, where goods of the public in general may be received and delivered. In other words, a double charge may not be imposed for the same thing."

If such action should be taken, shippers located on industry tracks, whose cars go directly from the breaking-up yards to these tracks, could not be compelled to pay for the use of the team track terminal facilities, but on the other hand they could be compelled to pay for the use of terminal facilities on the industry tracks. We need not now determine whether, in that event, a higher rate for industry than for team-track delivery could be permitted or compelled if the cost of each delivery to the carrier were the same, in order to prevent the large shipper located on an industry track from gaining such advantage as would naturally accrue to him from his location.

The commission, however, has not yet attempted to exercise this possible power. It has acted on the basis of the long established American practice, which it was justified in assuming would be continued. Under that practice the shippers on industry tracks pay a delivery charge in the regular transportation rate. Nothing in the order sought to be enjoined compels the railroads to continue to maintain the industry tracks or to make delivery thereon. If, however, they voluntarily make delivery thereon, instead of on their other tracks, they are prohibited from exacting additional compensation for a service found to be substantially the same as that for which payment has already been made.

Moreover, nothing in the order prevents the railroads from making different transportation charges to the various depots or tracks in the city. A difference of seven miles in the length of the haul might under some circumstances justify a difference in the transportation rate. That rate, however, is not in question on this record. Moreover, this extreme difference in the length of some of the hauls
179 does not, in my judgment, justify the court in holding as untenable the finding of the commission, based on a careful consideration of all the physical and economic conditions, that industry and team-track delivery in these cities are practically identical.

The conclusion of the commission is, in substance, that in as much as under the American practice no separate charge is made for team-track delivery, but only a single charge for transportation, including delivery, a separate charge for the similar, no more costly, and voluntarily substituted spur-track delivery is an unreasonable practice. An order prohibiting the charge is, in my judgment, within the powers granted to it under section fifteen of the act to regulate commerce.

180 And on the same day, to wit, the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order denying motion to dismiss and suspending order of Interstate Commerce Commission.

181 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,	No. 2. April session, 1911.
vs.	
INTERSTATE COMMERCE COMMISSION AND THE United States, respondents.	

This cause coming on to be heard on motion of petitioners for a preliminary injunction, and on motion of respondents to dismiss the

bill of complaint on the ground that it does not state facts sufficient to constitute a cause of action, and having been argued by counsel, Mr. Robert Dunlap, Mr. C. W. Durbrow, and Mr. H. A. Scandrett appearing for petitioners, Mr. P. J. Farrell for the Interstate Commerce Commission, Mr. Assistant Attorney General Fowler for the United States, and Mr. Seth Mann for certain interveners, and upon due consideration thereof, it is thereupon this 20th day of July, 1911, ordered that said motion to dismiss be and the same is hereby denied.

It is further ordered that the order of the Interstate Commerce Commission set forth in said bill of complaint, and a copy of which is hereto annexed, dated on or about April 11, 1910, and the effective date of which has been postponed by the commission to August 1, 1911, be and the same is hereby suspended until the further order of this court.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

182 Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of April, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

ASSOCIATED JOBBERS OF LOS ANGELES *v.* THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; Southern Pacific Company; and San Pedro, Los Angeles & Salt Lake Railroad Company.	No. 1704.

This case being at issue on complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July,

1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

It is further ordered, That said defendants be, and there are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

183 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 21st day of July, 1911, I served the within order on the United States, by leaving a copy thereof with Blackburn Esterline, its designated agent, at the Department of Justice, the same being his office in the city of Washington, District of Columbia.

July 21st, 1911.

F. J. STAREK, *Marshal,*
By JAMES L. MURPHY,
Deputy.

Copy handed to Mrs. B. M. Power.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 21st day of July, 1911, I served the within order on the Interstate Commerce Commission, by leaving a copy thereof with its chairman, Judson C. Clements, its designated agent, at Washington, D. C., the same being his office in the city of Washington, District of Columbia.

July 21st, 1911.

F. J. STAREK, *Marshal,*
By JAMES L. MURPHY,
Deputy.

Copy handed to A. R. Mackley.

184 And afterwards, to wit, on the 18th day of August, 1911, came the respondent and the intervening respondents, by their solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain petition for appeal in the words and figures following, to wit:

Petition for appeal.

185 In the United States Commerce Court.

THE ATCHISON, TOPEKA & SANTA FE Railway Company; Southern Pacific Company; and San Pedro, Los Angeles and Salt Lake Railroad Company, petitioners,

v.

INTERSTATE COMMERCE COMMISSION, respondent; the United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents.

April session, 1911. No. 2.

Petition for appeal.

The Interstate Commerce Commission, respondent, the United States of America, intervening respondent, and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents, feeling themselves aggrieved by the interlocutory order or decree of the Commerce Court, entered July 20, 1911, suspending and enjoining the order of the Interstate Commerce Commission, by their respective counsel, pray an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the said respondent and the said intervening respondents consider said order or decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And the said respondent and the said intervening respondents further pray that a transcript of the record, proceedings, and papers, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
GEO. W. WICKERSHAM,
Attorney General of the United States.
SETH MANN,
Solicitor for Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association.

AUGUST 17, 1911.

186 And on the same day, to wit, the 18th day of August, 1911, came the respondent and the intervening respondents, by their

solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain assignment of errors, in the words and figures following, to wit:

Assignment of errors.

187 In the United States Commerce Court.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,
v.
INTERSTATE COMMERCE COMMISSION, RESPONDENT, The United States, intervening respondent, and Associated Jobbers of Los Angeles, and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents.

April session, 1911.
No. 2.

Assignment of errors.

Come now the Interstate Commerce Commission, respondent, The United States of America, intervening respondent, and Associated Jobbers of Los Angeles, and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents, by their respective counsel and in connection with their application for appeal file the following assignment of errors, on which they will rely upon their appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered July 20, 1911, in the above-entitled cause.

The Commerce Court erred—

I.

In granting the motion for a preliminary injunction and in suspending the order of the Interstate Commerce Commission until the further order of the court (a) for that the petition does not set forth any cause of action and is insufficient to justify the order or decree suspending the order of the Interstate Commerce Commission or to form the basis for any relief; (b) for that in the said petition there is no equity upon which to base the order or decree suspending the order of the Interstate Commerce Commission or to form the
188 basis for any relief; (c) for that the said petition does not show that in making its said order the Interstate Commerce Commission acted beyond its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) for that the said petition does not show that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States, or any

other right of the said petitioners over which the Commerce Court may exercise jurisdiction.

II.

In suspending the order of the Interstate Commerce Commission, for that the said order is not open to attack in the courts because the said Interstate Commerce Commission in making and entering the said order kept within the powers conferred upon it by the statute.

III.

In suspending and enjoining the order of the Interstate Commerce Commission, for that the petition and exhibits thereto show that the Associated Jobbers of Los Angeles, representing the shippers interested in the subject matter, did file before the Interstate Commerce Commission their certain petition against the said three railroad companies which briefly stated the facts; that the said three railroad companies named did file their separate answers in writing to the said petition; that a full hearing was had by the said Interstate Commerce Commission in the premises, and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion,
189 together with its decision, order, or requirement in the premises, it found as a fact that the industrial sidetracks and spur tracks for the placing of cars upon which the petitioners charge shippers $2.50 per car are a portion of petitioners' terminal facilities in the city of Los Angeles and bear the same relation to petitioners' lines of railroad as the team tracks for the placing of cars upon which the petitioners make no charge; and found as a further fact that the services rendered in setting cars upon said tracks is not an additional service justifying an additional charge but is a service the payment for which is covered by the regular transportation rates and charges; and found as a further fact that the charge of $2.50 per car for setting cars upon said industrial tracks and spur tracks in addition to the rates for transportation under petitioners' rates as a whole is unjust and unreasonable and in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to form the basis for the suspension order or for any relief.

IV.

In suspending and enjoining the order of the Interstate Commerce Commission, for that the petition and the exhibits thereto show that the Associated Jobbers of Los Angeles, representing the shippers interested in the subject matter, did file before the Interstate Com-

merce Commission their certain petition against the said three railroad companies, which briefly stated the facts; that the said three railroad companies did file their separate answers in writing to the said petition; that a full hearing was had by the said Interstate Commerce Commission in the premises and that in its report in
190 writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, it found as a fact that the said industrial tracks and spur tracks are but a part of the petitioners' terminal facilities in the city of Los Angeles and bear the same relation to petitioners' lines of railroad as the said team tracks; and found as a further fact that the service rendered in setting the cars upon industrial sidetracks and spur tracks is not an additional service rendered but is a service covered by the regular transportation rates and charges; and found as a further fact that the carriers of the United States universally treat such industrial side tracks and spur tracks as portions of their terminals, making no extra charge for services thereto when the carrier received the benefit of the line haul out or in, the only three exceptions being Los Angeles, San Francisco, and San Diego; and found as a further fact that each of the industrial tracks or spur tracks referred to in its report is a railroad terminal at which the carrier receives and delivers freight; and that the charge of said $2.50 per car for such delivery on said industrial tracks or spur tracks constitutes an unjust and unreasonable regulation and practice in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to form the basis for the suspension order or for any relief.

V.

In suspending and enjoining the order of the Interstate Commerce Commission, for that the petition and the exhibits thereto show that
the Associated Jobbers of Los Angeles, representing the ship-
191 pers interested in the subject matter did file before the Interstate Commerce Commission their certain petition against the said three railroad companies which briefly stated the facts; that the said three railroad companies did file their separate answers in writing to the said petition; that a full hearing was had by the said Interstate Commerce Commission in the premises; and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, it found as a fact that the said industrial side tracks and spur tracks are but a part of the petitioners' terminal facilities in the city of Los Angeles and bear the same relation to petitioners' lines

of railroad as the said team tracks; and found as a further fact that the service rendered in setting the cars upon industrial side tracks and spur tracks is not an additional service rendered but is a service covered by the regular transportation rates and charges; and found as a further fact that there are 97 places in California to which coast terminal rates apply which are lower than to intermediate points, and that in only the cities of Los Angeles, San Francisco, and San Diego is there such a charge for spur track delivery, though in many such places such delivery is furnished; that the carriers serving the cities of Portland, Seattle, Tacoma, and a number of other points to the north, impose no such charge and that to the east, where petitioners' lines have their termini in cities competing with Los Angeles, this charge is unknown; and that the charge of said $2.50 per car is unjustly discriminatory and unjustly preferential and prejudicial against those from whom the said charge is exacted and is in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine and its report and order in the premises are conclusive upon the court, and the matters and things alleged in the petition are insufficient to form the basis for the suspension order or for any relief.

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VI.

In disregarding and overthrowing the findings of the Interstate Commerce Commission and in substituting the judgment of the Commerce Court for the judgment of the commission, (a) in holding that the Commerce Court is not bound by the findings of the commission that the industrial track service is the same as the team track service; (b) in holding that the Commerce Court is not bound by the findings of the Interstate Commerce Commission except in cases where there is a substantial conflict in the evidence or testimony upon which a finding of the commission is based; (c) in holding that the Commerce Court may consider the weight of the testimony; (d) in holding that the ultimate conclusion of the Interstate Commerce Commission consisting of mixed questions of law and fact is not conclusive upon the court.

VII.

In disregarding and overthrowing the findings of the Interstate Commerce Commission and substituting the judgment of the Commerce Court for the judgment of the Interstate Commerce Commission, (a) in holding that the transportation of cars and freight to and from industrial plants is not the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot or at the team tracks in Los Angeles; (b) in holding that in the absence of statute the carriers in the present

case are not bound to perform this industrial track service, and that if they voluntarily perform it, they may make a reasonable charge therefor; (c) in holding that the general tariff charge covers
193 delivery only to the team tracks, and does not cover delivery to and over the industrial or spur tracks.

VIII.

In disregarding and overthrowing the findings of the Interstate Commerce Commission and substituting the judgment of the Commerce Court for the judgment of the Interstate Commerce Commission, (a) in holding that the general tariff charge for the transportation of freight to Los Angeles does not include payment for the delivery of such freight to the industrial plants; (b) and in holding that the tariff charge fixed by the carrier only carries the freight to the team tracks; (c) and in holding that the general tariff charge fixed by the carrier which only carries the freight to the team tracks and the tariff charge fixed by the carrier for the industrial track service are conclusive that the general tariff charge for the transportation of freight to Los Angeles does not include delivery to the industrial plants.

IX.

In holding that the contracts made and entered into by and between the petitioners and the shippers or owners of the industrial plants relating to the construction, operation, and maintenance of the industrial tracks or spur tracks are valid, binding, and enforceable notwithstanding the report and order of the Interstate Commerce Commission.

X.

In holding that "If the carrier is not bound by law to deliver freight at the industrial plant, and it can not be success-
194 fully contended that it is, then it follows as a necessary consequence that this industrial track service is a special service and is not a service which the carrier is bound to perform for the general tariff charge for the transportation of freight destined to Los Angeles."

XI.

In abusing its discretion in suspending the order of the Interstate Commerce Commission, for that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion together with its decision, order, or requirement in the premises, said Interstate Commerce Commission found that the charge of $2.50 per car exacted by the several petitioners for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their

respective switching limits at Los Angeles, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to form the basis for the order of suspension or for any relief.

XII.

In suspending and enjoining the order of the Interstate Commerce Commission, for that in the petition and the exhibits referred to therein and attached thereto, and on the hearing of the application for a temporary or interlocutory order suspending and enjoin-
195 ing the order of the Interstate Commerce Commission, there is not and was not presented a single, distinct, and dominant proposition of law which the Interstate Commerce Commission had rejected and the exact influence of which, in its decision, could be estimated.

XIII.

In granting the motion for a preliminary injunction and in suspending the order of the Interstate Commerce Commission on the petition alone of the said petitioners and in disregarding and ignoring the answer of the Interstate Commerce Commission on file in said cause, which denies under oath all of the material allegations of the said petition.

XIV.

In not sustaining the motion of the United States, intervener, to dismiss the cause.

XV.

In overruling the motion of the United States, intervener, to dismiss the said cause.

Wherefore said respondent and intervening respondents pray that the said interlocutory order or decree of the Commerce Court entered July 20, 1911, be reversed, annulled, and set aside, and that the said petition be dismissed, and for such other and further order as may be appropriate.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
GEO. W. WICKERSHAM,
Attorney General of the United States.
SETH MANN,
Solicitor for Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association.
AUGUST 17, 1911.

196 And afterwards, to wit, on the 19th day of August, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order allowing appeal.

197 In the United States Commerce Court.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company, petitioners.

v.

INTERSTATE COMMERCE COMMISSION, RESPONDENT; The United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents.

April session, 1911. No. 2.

Order allowing appeal.

Be it remembered that in the above entitled cause, on this 18th day of August, 1911, the Interstate Commerce Commission, respondent; The United States, intervening respondent; and Associated Jobbers of Los Angeles and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered July 20, 1911, and having at the same time made and filed their assignment of errors; and having in all respects conformed to the statute and the rules of the court in such case made and provided—

It is ordered and decreed that the said appeal be and the same is hereby allowed as prayed, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

[SEAL.] R. W. ARCHBALD,
Judge of the United States Commerce Court.

AUGUST 18, 1911.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company, petitioners,

v.

INTERSTATE COMMERCE COMMISSION, RESPONDENT; The United States, intervening respondent; and Pacific Coast Jobbers and Manufacturers' Association and Associated Jobbers of Los Angeles, intervening respondents.

April session, 1911. No. 2.

Praecipe for record.

To the clerk of said court:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal of the respondent and the intervening respondents, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Bill of complaint.

Chancery subpœna.

Certificate of the Attorney General to expedite the hearing.

Order fixing the time of the hearing.

Order of Interstate Commerce Commission postponing date on which its order sought to be enjoined became effective.

Appearance of P. J. Farrell, Esq., solicitor for Interstate Commerce Commission.

Answer of Interstate Commerce Commission.

Replication to said answer.

Stipulation to transfer cause to the United States Commerce Court.

Order transferring cause to the United States Commerce Court.

Motion of Interstate Commerce Commission to proceed to final hearing without receiving testimony or other evidence.

199 Petition of intervention of Pacific Coast Jobbers and Manufacturers' Association.

Petition of intervention of Associated Jobbers of Los Angeles.

Order permitting said interveners to intervene.

Order permitting United States to intervene.

Motion of United States to dismiss.

Opinion of the United States Commerce Court.

Order denying motion to dismiss and suspending order of the Initerstate Commerce Commission, with a copy of the last-mentioned order.

Service of said orders upon the Interstate Commerce Commission and the United States.

Petition for appeal, assignment of errors, and order allowing appeal.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
SETH MANN,
Solicitor for Pacific Coast Jobbers and Manufacturers' Association and Associated Jobbers of Los Angeles.

200 In the United States Commerce Court.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,
vs.
THE INTERSTATE COMMERCE COMMISSION, RESPONDENT; The United States, Pacific Coast Jobbers & Manufacturers' Association, and Associated Jobbers of Los Angeles, intervening respondents.
} No. 2.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 199, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the praecipe filed in the clerk's office of said court on the 6th day of September, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 15th day of September, A. D. 1911.

[SEAL.]

G. F. SNYDER,
Clerk.
By W. S. HINMAN,
Deputy Clerk.

201 In the United States Commerce Court.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,
v.
INTERSTATE COMMERCE COMMISSION, respondent, and Associated Jobbers of Los Angeles, and Pacific Coast Jobbers' and Manufacturers' Association, intervening respondents.

April session, 1911.
No. 2.

Citation on appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Commerce Court, Washington, D. C., wherein the Interstate Commerce Commission, the United States of America, and Associated Jobbers of Los Angeles, and Pacific Coast Jobbers' and Manufacturers' Association are appellants, and the Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company are appellees, to show cause, if any there be, why the order or decree of the United States Commerce Court against the said appellants as in the said petition of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Martin A. Knapp, presiding judge of the United States Commerce Court, this 18th day of August, A. D. 1911.

[SEAL.]

G. F. SNYDER,
Clerk of the United States Commerce Court.
By W. S. HINMAN,
Deputy Clerk.

Allowed:
R. W. AUTTEL,
Judge of the United States Commerce Court.

202 Service of a copy of the within citation is hereby admitted this 23rd day of August, A. D. 1911.

ROBERT DUNLOP,
J. J. NORTON,
Solicitors for the Atchison, Topeka & Santa Fe Railway Company.
F. C. DILLARD,
Solicitor for the Southern Pacific Company and San Pedro, Los Angeles & Salt Lake Railroad Company.

(Indorsement on cover:) File No. 22863. United States Commerce Court. Term No. 431. The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers' and Manufacturers' Association, appellants, *vs.* The Atchison, Topeka & Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company. Filed September 21, 1911. File No. 22863.

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Vincent v. *Chicago & Alton R. R. Co.*, 49 Ill. 33.

Sec. 7, act of June 18, 1910, 36 Stat. 539, 544, 545.

The present case is not that of a carrier making delivery by means of a terminal company "to a point off its line," for which delivery it is entitled to make an extra charge, as in the case of *I. C. C.* v. *Stickney*, 215 U. S. 98, but the controversy is limited to the narrow question of the right of appellees to make an extra charge for deliveries on spurs which are found to constitute a part of their own terminals, tracks, etc 16

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE INTERSTATE COMMERCE COMMISSION, the United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants,
v.
SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka and Santa Fe Railway Company, appellees. } No. 97.

THE INTERSTATE COMMERCE COMMISSION, the United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants,
v.
ATCHISON, TOPEKA AND SANTA FE RAILway Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, appellees. } No. 98.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Appeals are here presented from interlocutory orders entered by the Commerce Court suspending

and enjoining the order of the Interstate Commerce Commission. The Commerce Court wrote a full opinion disposing of the whole case on the merits.

At all points throughout the United States, with the three exceptions of San Francisco, Los Angeles, and San Diego, it has been the established custom for interstate carriers to make deliveries of line haul carload freight on the spurs leading to industrial plants, without charge other than the through freight rate. At San Francisco and Los Angeles the appellees make an extra charge of $2.50 per car for spur track delivery, and of this the Associated Jobbers of Los Angeles and others have complained.

At Los Angeles each carrier has designated certain territory as switching or yard limits. These limits extend for six or seven miles in a general easterly and westerly direction, and include numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight shed tracks, hold tracks, repair tracks, and others; and also their stations, freight sheds, derricks, roundhouses, and other structures (R. 43).[1]

The spurs vary in length. Some lead directly from the main track into, or alongside of, the industrial plant. Others are of greater length, and branch at one or more points, with short spurs running off from what is known as the " lead " to several plants in the immediate neighborhood (R. 43).

[1] Unless otherwise indicated, the references will be to the record in No. 98.

The spurs have been constructed under substantially uniform contracts between the carrier and the shippers, and are often laid upon public streets and over private property. The carrier furnishes all material and constructs the spurs. The shipper pays the entire cost. The title to all of the material and appurtenances remains in the carrier as its sole and exclusive property. The carrier reserves the right to use the spur for the receipt or delivery of any freight. The right at any time to remove the spur is also reserved to the carrier (R. 44).

All switching and handling of cars on the spurs is performed by the carrier with its own locomotives. The carrier may use the spurs for purposes of its own, as for storage of cars, leads to other industries, and sometimes for public delivery. They also furnish means of inter-industry switching (R. 44).

A train of cars arrives at the breaking-up yards, which lie at the entrance to the city. There it is divided up with respect to the character of the freight in the various cars and their destinations. No one has access to the cars at that point. This yard is purely a railroad facility. After the cars are segregated they are switched to various team tracks distributed along the main line, to different industries, to railroad shops, to freight sheds, and to stockyards. Before the cars are placed, the consignees are given notice of the tracks to which they are sent. The engines which place

the cars on one track also serve to haul the " loads " in and the " empties " out at the other tracks (R. 49).

With these spurs the carrier makes extensions of its own line for various terminal uses. It makes a new highway for intercommunication between the carrier and the industry, and likewise between each industry so connected, and all others having a similar connection. The spur attaches the industry to the carrier in such a way that the latter has practical assurances of the industry's traffic, both outbound and inbound (R. 45).

The service is always performed by the carrier before any delivery is made to the consignee (R. 48). It is a substituted service, which the carrier has solicited the right to give.

The spur track delivery involves no greater expense than team track delivery. It relieves the carrier's team track and sheds, and necessitates less outlay for expense of yards in a crowded city. It promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle (R. 49). Each spur is in a real sense a railroad terminal, at which the carrier receives and delivers freight. In recognition of such relationship, the carriers of the land universally treat such industry spurs as portions of their terminals, making no extra charge for service thereto when the carrier

receives the benefit of the line haul out or in (R. 46).

Out of ten thousand cities and towns in the United States, the appellees could name but three exceptions, Los Angeles, San Francisco, and San Diego, where an additional charge is made for spur track receipt or delivery (R. 46).

There are ninety-seven places in California which take coast terminal rates lower than the rates to intermediate points. The theory justifying these lower rates is water competition (R. 46).

In only the three cities named is there such a charge for spur track delivery, though in many of such places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal rates, the Southern Pacific, Northern Pacific, and Great Northern lines impose no such charge. To the east, where appellees' lines have their termini in cities competing with Los Angeles, this charge is also unknown (R. 46).

After exhaustive investigation the Commission found, taking the service as a whole, in the same way that it was treated by the carriers, that the spur track delivery is no more expensive to the carriers than if all cars were given team track delivery (R. 49).

The only explanation for the extra charge of $2.50 for spur track delivery is because the appellees are practically the only carriers who may compete

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for the freight, and it is easy for them to agree. When competition is inimical to their interests they do not compete. When asked by the Commission why this charge was made at these points the traffic manager of one of the roads replied, " Because we can get it." Another railroad official before the Commission explained the nonexistence of such a charge at all other points on his line, as well as throughout the country at large, by saying that the absence of such a charge was a " tribute to competition " (R. 46).

The findings of the Commission (Knapp, Chairman, dissenting), based upon the evidence before it, may be summarized as follows:

First. The spurs and side tracks which connect industries with a carrier's rails within switching limits constitute a portion of the carrier's terminal facilities.

Second. The delivery of a car upon an industrial siding is a substitute for delivery upon public team tracks, involves no additional service or burden, and can not be made the basis for an additional charge.

Third. As a corollary of these two propositions—the charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and side tracks within switching limits when such carload freight is moving incidentally to a system line haul, is unjust and unreasonable, discriminatory as between Los Angeles and other cities, and unlawful.

The Commerce Court (Judge Mack dissenting) reviewed the facts at length and suspended the order of the Commission until the further order of the court. Thereupon the Commission and the United States appealed.

The report of the Commission may be found in the record in No. 98, p. 42. The cases differ only as to the cities in which they arose, No. 97 in San Francisco and No. 98 in Los Angeles. Both before the Commission and the Commerce Court they were heard together and will be so presented here.

ASSIGNMENTS OF ERROR.

The assignments of error in No. 97 appear on page 72, and in No. 98 on page 100. It would serve no purpose to set them forth at length here. The gist of the complaint on the part of the appellants is that the Commerce Court substituted its judgment on the facts for the judgment of the Commission.

ARGUMENT.

I.

The Commission has found as a fact that the spurs and side tracks which connect industries with a carrier's rails within switching limits constitute a portion of the carrier's terminal facilities. This finding is conclusive upon the courts.

The question as to what are and what are not terminal facilities is manifestly a question of fact to be determined according to the circumstances of

each particular case. The Commission after a careful review of all the attending facts and circumstances found the spur tracks in question to be a part of the carrier's terminals in the same sense as its stations, team tracks, and freight sheds.

The findings of the Commission were not only in line with the facts before it, but accorded with the provisions of the Act to Regulate Commerce as well as with certain well-considered judicial decisions, all of which the Commerce Court ignored.

Section 7 of the act approved June 18, 1910, 36 Stat. 539, 544, 545, which reenacted in its original form section 1 of the act of June 29, 1906, 34 Stat. 584, provides:

> The term "railroad" as used in this act shall include * * * all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; * * *.

In *Vincent* v. *Chicago & Alton Railroad Co.*, 49 Illinois Reports, 33, the complainants owned a warehouse in Chicago, situated upon the railroad, and connected with it by a side track about 150 feet in length, two blocks from the freight depot and between that and the passenger depot. The complainants were engaged in the grain business. The side track was constructed under a contract between the parties. The railroad company had re-

ceived and delivered carload freight to and from the elevator on the side track. Subsequently, it refused to make deliveries to the elevator on the side track, *except on payment of an additional charge of $5 per car.* The statute provided that railways should make deliveries to any warehouse on their lines selected by the consignees. On bill filed, it was alleged that the extra charge of $5 per car was excessive and extortionate. The bill concluded with a prayer that the defendants be restrained from delivering cars of grain to any other place except as consigned, and also from imposing the charge of $5 per car for delivery at the elevator, or any other excessive charge. On demurrer the bill was dismissd. In reversing the judgment, the Supreme Court of Illinois said (p. 41):

> It is urged, however, by the counsel for the company, that this act does not mean that railway corporations shall deliver grain at points off their line. Clearly it does not; but the question recurs, what points are to be considered as on the line of a railway for the purposes of delivery under this law? As to this, we differ from the counsel of appellee. They contend that its line consists only of its main track and such side tracks as belong to it. For most purposes this is undoubtedly true, but not in reference to their duties under this statute. A railway company can unquestionably refuse to allow the owner of adjacent property to lay down a side track connecting with its own rails, but when, for a valid consideration, it has once conceded

that right, and, as in the case before us, has permitted the connection to be made, and the side track to be laid, for the use of a particular lot of ground, and in order to transport to such lot heavy articles of freight, and the owner of such lot and side track has his warehouse in readiness for the receipt of such freight, then, we say, that such side track is to be considered as a part of its line for the purposes of delivery under this statute. There is no reason why it should not be so regarded as much as if the elevator stood upon a side track belonging to the railway itself. What difference does it make to the company who owns the ground, or who has laid the rails? Can it not deliver a car load of wheat with the same convenience whether the side track belongs to itself or to some other person with whom it has bargained the track may be laid? And when we thus speak of equality of convenience, we are to bear in mind that railways have been excused from delivery to consignees only on the ground of impossibility, and not as a matter of convenience. Counsel say the company has no right upon such a side track except by permission of the owner. As well might it be said that a common carrier by wagon had no right to drive through the gateway of the consignee for the purpose of delivering goods, and he was therefore to be excused for non-delivery. After the track has been laid for the purpose of receiving freight, the company has a right to send its cars there for the purpose of de-

livery, until forbidden by the owner. When that is done, the company will be excused from delivery.

In *Chicago & North Western Railway Co.* v. *The People,* 56 Illinois Reports, 365, the owners of a grain warehouse in Chicago sought, by writ of mandamus, to compel the railway company to deliver to the warehouse whatever grain in bulk might be consigned to it upon the line of the road. In sustaining the writ, the Supreme Court of Illinois said (p. 382):

> In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and no where else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the

terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

In *Coe & Milsom* v. *Louisville and Nashville Railroad Co.*, 3 Fed. Rep. 775, the complainants had erected stockyards on the railroad. Subsequently, the railroad company entered into a contract with a stockyard company by which it sought to give it the exclusive right to conduct the stockyard business at Nashville. It also refused to make deliveries to the stockyards of the complainants. The complainants sought to enjoin the railroad company from refusing to receive and transport stock to and from their yards and from refusing to per-

mit the complainants to continue their business. In issuing the writ of injunction Circuit Judge Baxter said (p. 778):

> This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided. Hence it is that persons engaged in receiving and forwarding live stock, manufacturers consuming large quantities of heavy material, dealers in coal, and grain merchants, receiving, storing, and forwarding grain in bulk, who are dependent on railroad transportation, usually select locations for the prosecution of their business contiguous to railroads, where they can have the benefit of side connections over which their freight can be delivered in bulk at their private depots; and may a railroad company, after encouraging investments in mills, furnaces, and other productive manufacturing enterprises on its line of road, refuse to make personal delivery of the material necessary to their business, at their depots, erected for the purpose, and require them to accept delivery a mile distant, at the depot of and through a rival and competing

establishment? Or may such railroad company establish a "Union Coal Yard" in this city, and constitute it its depot for the delivery of coal, and thus impose on all the coal dealers in the city, with whom it has side connections, the labor, expense, and delay of carting their coal supplies from such general delivery to their respective yards? Or may such railroad company, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?

If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. * * * A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses.

In *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, the proprietors of a stockyard filed a petition in a railroad foreclosure suit in which a receiver had been appointed who was operating the railroad under an order of the court. They sought to compel the receiver to permit the erection of cattle chutes and yards on the line for the receipt and delivery of their live stock. All the live stock shipped on the railroad was delivered by the re-

ceiver through the stockyards to an incorporated company, a short distance from petitioner's yards, under a contract made by the railway company with the stockyards. The latter *charged the petitioners and other shippers and consignees a yardage fee for all stock loaded and unloaded by the railroad company.* The Circuit Court held that it was the duty of the railroad company as a carrier of live stock to provide reasonable facilities for the loading and unloading of the stock transported; further, that such facilities necessarily included chutes and yards where the cattle might be kept until called for by the owners; finally, that it could not, in addition to the customary and legitimate charges for transportation, *itself make or allow any agent it employed to make a special charge for merely receiving and delivering such stock in and through yards provided for that purpose.* An order was entered accordingly. In affirming the judgment, the Supreme Court, speaking through Mr. Justice Harlan, said (p. 135):

> * * * The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards pro-

vided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

The case at bar is not that of a carrier making delivery by means of a terminal company "to a point off its line," for which delivery it is entitled to make an extra charge. *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98. The present controversy is limited to the narrow question of the right of the appellees to make an extra charge for deliveries on spurs which are found to constitute a part of their own terminals, tracks, facilities, and equipment.

We have the action of the carriers in establishing the practice of making deliveries on the spurs as a part of their terminals and facilities. We have the acquiescence of the shippers in that practice. On complaint duly filed, and after full hearing, the Commission has dealt with the practice in all its aspects. Its order, in pursuance of its investigation, is a mere regulation. The Congress itself has dealt with these spurs as with other terminal facilities. Against the judgment of the carriers, the shippers, the Commission, the Congress, and the courts, the Commerce Court with its holding stands alone.

II.

The Commission found that the delivery of a car upon an industrial siding, such as those at bar, was a substitute for delivery upon public team tracks, involved no additional service or burden, and could not be made the basis for an additional charge. This finding is also conclusive upon the courts.

From its report it is manifest that the Commission considered all of the facts and circumstances (R. 42). No claim to the contrary is made.

These included, among other things, the location and extent of the yards, the number and length of the spurs, the construction, operation and maintenance thereof, the cost of the construction, the volume of the traffic, the usages and customs of other localities both near and far, the cost of the services, the manner in which they are performed, and the

relations of the respective shippers taking the different deliveries.

In addition to all these things, the Commission considered the difference between the American and English systems of dealing with terminal services and charges. It also observed, upon facts which it found, that the English method of treating terminal services and charges separately from the line haul—

> * * * has never obtained in this country, at least so far as the records of this Commission show. * * * The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates. * * * The refinement of the English method of stating rates has not appealed to the mind of the American railroad man, for the same reason, perhaps, that American hotel keepers do not make a separate charge to their guests for lights or soap. The American railroad rate is made to cover a terminal delivery, while the English railroads make a separate charge for the use of their terminals (authorities cited) (R. 47).

The report of the Commission is a careful and exhaustive exposition of the facts and a conclusive argument in support of its order.

With reference to the practice of making deliveries on the spurs without extra charge, the Commission further finds (R. 45):

> We have knowledge sufficient on which to base the conclusion that without such in-

> dustry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroads to develop traffic and facilitate its movement by the construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the saw mill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is, in fact, a necessity to both the carrier and the shipper under modern conditions of business and transportation.

This finding of the Commission is supported by facts of such common observation as to be within the scope of judicial knowledge. Without the use of the spurs as terminal facilities, all of the enormous carload tonnage into or out of Greater New York must be handled on a common team track or in a common depot. The same situation would obtain at Chicago, Pittsburgh, and all other points.

We would have the live stock, ore, coal, oil, grain, and other carload freight being driven or teamed through the streets of the cities.

That the Commerce Court boldly substituted its judgment on these facts and circumstances for that

of the Commission is beyond any question. A comparison of the language used by the Commission and the court conclusively so demonstrates.

The Commission:

> We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers (R. 45). The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. * * * After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team track delivery (R. 49).
>
> * * * Each of the spurs here considered is in a real sense a railroad terminal at which the carrier receives and delivers freight. In recognition of such relationship the carriers of the land universally treat such industry spurs as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in (R. 46).
>
> To this generalization, covering perhaps ten thousand cities and towns in the United States, the defendants could name but three

exceptions, the cities of Los Angeles, San Francisco, and San Diego. In these an additional charge is made for track receipt or delivery * * * (R. 46).

The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge. They treat a dependent spur as a part of their own depot to which the public rate carries all freight * * * (R. 47).

* * * delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks or at the sheds and later switched to oblige the consignee * * * (R. 49).

An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays (R. 49).

The Commerce Court:

* * * we are wholly unable to come to the conclusion * * * that the industrial or spur track service is the same service that the carrier performs by delivering to the team track or to the depot, and therefore are unable to say that the general tariff charge on freight shipped to Los Angeles from points of origin would include a delivery at the industrial plant. Nor are we able to see how it can be said that the general tariff

charge includes a delivery at the industrial plant (R. 92, 93).

On account of water and other competition the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that petitioners do not receive for such transportation sums which they are justly entitled to and which they would otherwise be able to charge and collect * * * (R. 89).

So far as the finding of the Commission that the industrial track service is the same as the team track or depot service is concerned, we are constrained to hold that it is not a finding which precludes this court from coming to a different conclusion upon the present record * * * (R. 92).

To say that the transportation of cars and freight to and from industrial plants loaded from one-fifth of a mile to 7 miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team track, is so contrary to the admitted physical facts as to be wholly untenable * * * (R. 92).

Judge Mack, dissenting:

If, then, these industry tracks are, as the commission in my judgment correctly finds them to be, terminal facilities of the railroad, and if, as the commission further finds, the service for which the charge in question is made is substantially the same service as

that which is performed by the carrier in delivering freight on its team tracks, the commission was justified in prohibiting, as an unreasonable practice, the additional so-called switching charge made for the delivery at the industry tracks (R. 95).

The commission * * * has acted on the basis of the long established American practice, which it was justified in assuming would be continued. Under that practice the shippers on industry tracks pay a delivery charge in the regular transportation rate. Nothing in the order sought to be enjoined compels the railroads to continue to maintain the industry tracks or to make delivery thereon. If, however, they voluntarily make delivery thereon, instead of on their other tracks, they are prohibited from exacting additional compensation for a service found to be substantially the same as that for which payment has already been made.

Moreover, nothing in the order prevents the railroads from making different transportation charges to the various depots or tracks in the city. * * * Moreover, this extreme difference in the length of some of the hauls does not, in my judgment, justify the court in holding as untenable the finding of the commission, based on a careful consideration of all the physical and economic conditions, that industry and team-track delivery in these cities are practically identical (R. 96).

In assuming to review the element of the so-called water competition and to substitute its judgment that the industrial track service is not the same as the team track or depot service for the contrary judgment of the Commission, the Commerce Court was assuming an authority condemned by every decision of this court for the past ten years.

Having reached the conclusion that these spurs and sidetracks were a part of the carrier's terminal facilities; that deliveries upon them were no different in cost and character from deliveries upon public team tracks; that the line haul rates for all other shippers embraced without additional charge deliveries at the terminal; and that only in the cities of San Francisco, Los Angeles, and San Diego was this spur track charge imposed, the conclusion of the Commission that the charge was unlawful followed as a matter of course.

Some effort was made by the appellees to evade this conclusion by the introduction of contracts made for the building of these spur tracks. These contracts did not on their face contain any agreement to pay the charge of $2.50 per car for such delivery, but it is alleged that they were made and entered into with knowledge that such charge would be imposed, and that it thus became an implied term of the contract. But the Commerce Court quite properly ignored this suggestion with the statement " that such consent or implied contract on the part of the industrial plant owners would be

avoided if it was in conflict with any law of Congress regulating interstate commerce " (R. 93).

CONCLUSION.

According to every decision of this court the Commerce Court erred in substituting its judgment for that of the Commission as to what the facts were and the inferences to be drawn therefrom.

The action of the Commerce Court in holding, on the face of the bills alone, that it had power to decide, notwithstanding the findings of the Commission based on the evidence, that the service for deliveries to the spur tracks was different from the service for deliveries to the team tracks, with a consequent difference in cost, was so flagrantly erroneous as to require a reversal of the judgments.

The Commerce Court held that " the ultimate conclusion of the Commission is a mixed question of law and fact which certainly ought not to be conclusive upon this court." (R. 92.) But this court has held that even on a mixed question of law and fact the findings of the Commission are conclusive. *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 459.

The act of Congress approved October 22, 1913, which abolished the Commerce Court, provides:

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any

of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

* * * * *

Any case hereafter remanded from the Supreme Court which, but for the passage of this act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

The judgments should be reversed and the causes remanded to the appropriate district court of the United States, with directions to that court to dis-

solve the preliminary injunctions and to dismiss the bills.

JOHN W. DAVIS,
Solicitor General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

NOVEMBER, 1913.

O

In the Supreme Court of the United States.

October Term, 1912.

In Equity. No. ~~430~~ 97.

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants,

v.

Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company.

In Equity. No. ~~431~~ 98.

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants,

v.

Atchison, Topeka & Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company.

Appeal from the United States Commerce Court.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission,
Appellant.

WASHINGTON: GOVERNMENT PRINTING OFFICE: [illegible]

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE INTERSTATE COMMERCE COMMISSION, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, Appellants,

v.

SOUTHERN PACIFIC COMPANY AND THE Atchison, Topeka & Santa Fe Railway Company.

In Equity. No. ~~430~~ 97.

THE INTERSTATE COMMERCE COMMISSION, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, Appellants,

v.

ATCHISON, TOPEKA & SANTA FE RAILway Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company.

In Equity. No. ~~431~~ 98.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

These cases come here by appeal from interlocutory decrees of the Commerce Court, enjoining enforcement of two orders of the Interstate Commerce Commission dated April 11, 1910, which were made and entered in two proceedings instituted before the commission, one of which, numbered 1649 on the commission's docket and known as the San Francisco Switching-Charge case, was so instituted by the Pacific Coast Jobbers' & Manufacturers' Association against the Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company (Rec., No. 430, 13); and the other of which, numbered 1704 on the commission's docket and called the Los Angeles Switching-Charge case, was so instituted by the Associated Jobbers of Los Angeles against the carriers above named and the San Pedro, Los Angeles & Salt Lake Railroad Company (Rec., No. 431, 14).

In the complaint filed before the commission in No. 1649, it was alleged that a switching charge of $2.50 per car exacted by the Southern Pacific and Atchison companies for terminal services performed by them at San Francisco constituted a violation of sections 1, 2 and 3 of the act to regulate commerce (Rec., No. 430, 17–18). And in the complaint in

No. 1704, it was alleged that a like charge exacted by the Southern Pacific, Atchison and San Pedro companies for terminal services performed by them at Los Angeles constituted a like violation of the act (Rec., No. 431, 21–22).

The body of the order in No. 1704 reads:

> This case being at issue on complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:
>
> It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the

> said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.
>
> It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul. (Rec., No. 431, 10–11.)

The order in No. 1649 is the same in substance as that in No. 1704, except that the former relates to terminal services performed by the carriers at San Francisco and is directed against the Southern Pacific and Atchison companies, while the latter pertains to terminal services performed by the carriers at Los Angeles and is directed against the Southern Pacific, Atchison and San Pedro companies (Rec., No. 430, 10).

In its report in the Los Angeles case the commission, speaking through Commissioner Lane, said:

> Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous

tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over and above the freight rate named in the tariffs, while at industry spurs an additional charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the "lead" to serve other industries in the immediate neighborhood. These spurs have been constructed under substantially uniform contracts. The standard form of the Southern Pacific Company provides as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the

business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low at that from or to point in question by any other rail route."

The Santa Fe contract contains this provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent

therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

None of the industries at Los Angeles furnishes its own motive power, and interline switching is done from the interchange track to the industry by the locomotives of the delivering line, the carrier performing the switching service.

The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations, both of these contentions are sound. These industry spur tracks are not private, in that the carrier may use them for purposes of its own—as for storage of cars, as leads to other industries, and sometimes for public delivery. They are often laid upon public streets and over private property, are operated exclusively by the railroad with its own engines, and furnish means of interindustry conveyance by rail, for which the carrier properly imposes a switching charge. Thus, in connecting its main line directly with a spur, the carrier serves itself in various ways; it gains an extension of its own line for various terminal

uses, makes a new highway for intercommunication between the carrier and the industry and likewise between each industry so connected and all others having a similar connection, and it attaches the industry to the carrier in such a way that the latter has a practical assurance of the industry's traffic both outbound and inbound. On the other hand, there can be no doubt but that the industry also benefits by such connection, in that it can receive by this spur track direct delivery of its freight without the expense and trouble of draying to and from public team tracks. Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a special, and generally in practice an exclusive, railroad depot for the carload freight of a particular shipper. There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroads to develop traffic and facilitate its movement by the construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the sawmill, the factory, the blast furnace, the stone quarry, and the

jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility; a shipper's convenience; it is in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation.

We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers. In saying this we are fully conscious of the authority of the *Alton case* (*Chicago & Alton* v. *United States*, 156 Fed. Rep., 558) and the *General Electric* and *Solvay Process cases*, 14 I. C. C. Rep., 237, 246. Such industrial spurs as are here considered, however, are of a totally different character and of a different nature from those considered in these three named cases. They correspond rather to the railroad tracks leading to the interchange tracks with such industries, and the switching movement given by the carriers without extra charge to such interchange tracks passed unquestioned in the above cases. It was assumed by court and commission that there was no violation of law in placing a car at a point where an industry engine could connect with it and take it within the plant. But in Los Angeles there are no tracks of this character. Each of the spurs here considered is in a real sense a railroad terminal at which the carrier receives and delivers freight. In

recognition of such relationship the carriers of the land universally treat such industry spurs as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in. To this generalization, covering perhaps ten thousand cities and towns in the United States, the defendants could name but three exceptions, the cities of Los Angeles, San Francisco, and San Diego. In these an additional charge is made for track receipt or delivery. When asked why this charge was made at these points, the traffic manager of one road replied, "Because we can get it." Another railroad official explained the non-existence of such a charge at all other points upon his own line, as well as throughout the country at large, by saying that the absence of such charge was a "tribute to competition." It appears that the same charge for such delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city. It was first imposed by the Southern Pacific and, as the other lines came in, they adopted the policy of the line already there. As to certain commodities such charge was not imposed until quite recently, and at all times, until the Hepburn Act went into effect, there was great variation in the charge as between individual shippers.

There are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points. The theory justifying these lower rates is that water competition compels their maintenance,

yet in only the three cities named is there such a charge for spur-track delivery, though in many of such places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal rates, the Southern Pacific, Northern Pacific, and Great Northern lines impose no such charge, and to the east where defendant lines have their termini in cities competing with Los Angeles, this charge is also unknown. (Rec., No. 431, 43–46.)

* * * Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.

Again it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the

breaking-up yards which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. Before the cars are placed the consignees are given notice of the tracks to which they are to be sent, so that there is no confusion, and the switch engines which place the cars on one track also serve to haul the "loads" in and "empties" out at the other tracks. After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.

An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the

> defendants at Los Angeles have done. (Rec., No. 431, 49.)
>
> * * * * *
>
> An order will be entered condemning as illegal and unjust the charge of $2.50 per car made by the defendant carriers for delivering or receiving interstate carload freight to or from industries located upon spurs or sidetracks within their switching limits when such carload freight is moving incidentally to a system line haul. (Rec., No. 431, 55.)

In its report in the San Francisco case the commission said:

> This case presents precisely the same questions as are raised in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I. C. C. Rep., 310. Both cases were heard together, and the facts in each are similar. We find the imposition of the charge for receipt from or delivery upon a spur track when incident to a system-line haul to be unlawful and unjust under the facts and circumstances presented in this case, and an order will be entered accordingly. (Rec., No. 430, 34–35.)

Prior to the effective date of the orders, but after they had been duly served upon the carriers, the latter filed their bills in the United States Circuit Court for the District of Kansas, First Division, to which answers were duly filed in said court thereafter by the commission.

The bill in the Los Angeles case contains allegations of fact which are practically the same as the statements of fact reported by the commission and

above set forth, and also contains other allegations which are in substance as follows:

1. That the freight depots at Los Angeles established and maintained by the carriers for the receipt, handling and delivery of less than carload freight are sufficient for the handling of double the amount of such freight which can be tendered in one day.

2. That the freight sheds and team tracks at Los Angeles established and maintained by the carriers for the receipt, handling and delivery of carload freight are sufficient to handle more than double the number of carloads of freight coming into or going out of that city.

3. That there is no necessity for industrial tracks.

4. That the truth of these allegations was established by the undisputed evidence in the record before the commission. (Rec., No. 431, 3–4.)

5. That, although at the time the industrial tracks were constructed there was no agreement between the shippers and carriers that the former would pay the $2.50 charge, the shippers knew such a charge was exacted from others for similar service and willingly consented to same, as was shown by the undisputed evidence in the record before the commission. (Rec., No. 431, 7.)

6. That in each instance the expense to the carriers of the switching service for receipt and delivery is greater when receipt or delivery is on one of the industrial tracks than when such receipt or delivery is on one of the other tracks of the carriers. (Rec., No. 431, 8.)

7. That competition has forced to an exceedingly low basis the rates to and from Los Angeles and San Francisco.

8. That the carriers do not receive rates which are as great as those they are entitled to. (Rec., No. 431, 8–9.)

9. That the carriers are not obliged to make deliveries except upon their team tracks or at their freight sheds. (Rec., No. 431, 9.)

10. That the carriers are entitled to make a charge in addition to the through rate, when receipt or delivery is upon one of said industrial tracks. (Rec., No. 431, 9.)

11. That the shippers entered into a conspiracy in connection with the subject-matter of the commission's orders. (Rec., No. 431, 9.)

These allegations, and like allegations contained in the petition in No. 430, were denied in its answers by the commission (Rec., No. 430, 38–44, and No. 431, 67–73).

After the cases were transferred to the Commerce Court, and after the United States, the Pacific Coast Jobbers' and Manufacturers' Association and the Associated Jobbers of Los Angeles were permitted to intervene as parties respondent, the commission, believing the above allegations of the bills to be irrelevant and immaterial, filed a motion in each of said cases, the body of which reads as follows:

> Comes now the Interstate Commerce Commission, the defendant in the above entitled suit, by P. J. Farrell, its solicitor, and moves

> this honorable court to proceed to final determination of the issues involved in said suit without receiving testimony or other evidence, and in support of said motion shows: that every material allegation contained in the bill of complaint of the above-named complainants is admitted in the answer of this defendant to said bill. (Rec., No. 431, 77.)

Thereafter the Pacific Coast Jobbers' and Manufacturers' Association and the Associated Jobbers of Los Angeles filed answers to the bills in and by which they adopted the answers which had previously been filed on behalf of the commission as aforesaid in the Circuit Court (Rec., No. 430, 47–50, and No. 431, 75–78).

After arguments of counsel had been made upon the above motion of the commission, and after the matters involved in that motion had been submitted to the Commerce Court for determination, the Attorney General filed on behalf of the United States a motion to dismiss the bills for insufficiency (Rec., No. 430, 52–53, and No. 431, 80–81).

After counsel for the parties had made their arguments upon the motion to dismiss, the Commerce Court rendered its decision in the premises (Rec., No. 430, 54–66, and No. 431, 83-94), and entered the interlocutory decrees (Rec., No. 430, 69, and No. 431, 96–97), from which appeals to this court were taken as aforesaid.

The assignments of error (Rec., No. 430, 72–78, and No. 431, 100–105), are to the effect that there is no equity in the bills.

POINTS.

THE COURT ERRED IN FAILING TO DISMISS THE BILLS FOR WANT OF EQUITY.

At the beginning of this argument we call the attention of the court, particularly, to the fact that the commission did not question the right of the carriers to exact an additional charge for an additional service, but it found that while, in this case, the carriers made such an additional charge they did not render therefor any additional service. In this connection we think best to repeat the pertinent language of the commission, which is as follows:

> An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done. (Rec., No. 431, 49.)

For the transportation of traffic in carload lots over their lines of railway from point of origin to point of destination, including services performed by them in receiving and delivering the traffic, the carriers demand and collect the through rate published and filed by them which is applicable to

such transportation, and no more, where the traffic is received or delivered by them on one of their team tracks at San Francisco or Los Angeles; but, where such receipt or delivery is from or to an industry located at San Francisco or Los Angeles on a side-track used by them and entirely under their control, the carriers demand and collect for such transportation the through rate made applicable as aforesaid and, in addition thereto, a charge of $2.50 per car. And the right of the carriers to exact either this charge or any part thereof is the sole matter of controversy in these cases. For convenience we will hereafter call the side-track above referred to an industrial track.

As above shown, the commission found that the carriers had made the industrial tracks at San Francisco and Los Angeles, and that such tracks were in fact, a part of their terminal facilities for the receipt and delivery by them of traffic at those points, and that where such receipt or delivery was on one of the industrial tracks the expense to the carriers was not greater than it would be if the receipt or delivery were instead upon one of the team tracks. (Rec., No. 431, 49.)

The conclusions of the commission were that the charge of $2.50 per car was relatively unreasonable to the full extent thereof and unjustly discriminatory. In other words, the commission concluded that said charge constituted a violation of the prohibitions contained in sections 1 and 2 of the act to regulate commerce, and those conclusions form the basis of

the orders which are the subject-matter of the controversy herein. (Rec., No. 430, 34–35, and No. 431, 49, 55.)

The jurisdiction of the commission in the premises is not denied, nor is it contended either that the commission failed to give a full hearing to the carriers against whom the orders are directed or that the orders were not duly served upon those carriers. However, it is said by the Commerce Court that the orders are invalid, because—

1. The conclusion of the commission that the charge of $2.50 per car for the service named was illegal and unjust is a conclusion of law and therefore not binding upon the court.

2. Said conclusion is based upon two findings: First, that the industrial track upon which the service was rendered is a terminal facility of the railroad and not a plant facility of the industry to which it leads; and, second, that the service for which the charge is made is the same service as that which is performed by the carrier in delivering freight at its depot or team tracks.

3. The commission made no finding that the charge of $2.50 in connection with the transportation of cars to and from industrial plants constituted an undue preference or advantage, or was discriminatory in any way.

4. On a motion to dismiss, the allegations of fact contained in the petition must be taken to be true notwithstanding that they are in conflict with the

facts included in the commission's report which is made a part of the commission's order and also a part of the petition.

5. Upon such undisputed facts we find that the service of delivery upon the industrial tracks is not the same as the service of delivery upon the team tracks.

6. The commission did not find that, if segregated from the general tariff charge and considered by itself, the charge of $2.50 was unreasonable.

7. We therefore hold that the carriers are entitled to the additional charge of $2.50 per car which was condemned by the commission as illegal and unjust. (Rec., No. 431, 90–93.)

The commission found that delivery upon the industrial tracks was not a service in addition to, but only a substitute service for, delivery upon the team tracks; that such substitute service is a service the carriers solicit a right to give; that it involves expense to the industries for the installation of the tracks and the use of their property as railway terminals; that it is a service over the carriers' own rails to points where they yield possession of the property transported; that it involves no greater expense to the carriers than would team track delivery; that it relieves the carriers' team tracks and sheds; that it reduces the expense to the carriers for yards in a crowded city; that it permits the speedy release of the carriers' equipment; that it aids in conducting a commerce which is greater than the carriers' own facilities could freely, adequately or economically handle; that the cars are not placed first at a spur or depot or on a

team track or at a freight shed of the carriers and later switched to oblige the consignee; that the cars for industrial track and other delivery are segregated at the breaking-up yards of the carriers; that shippers do not have access to cars while located at the breaking-up yards; that the breaking-up yards are purely railroad facilities; that before the cars are switched from the breaking-up yards, consignees are given notice as to where the cars will be delivered; that the same switching engines which haul cars to and from the industrial tracks from and to the breaking-up yards also haul cars to and from the team and other tracks from and to the breaking-up yards; and that the services performed by the carriers in receiving and delivering property upon the industrial tracks, and the services performed by the carriers in receiving and delivering property upon the team and other tracks, as aforesaid, are like services, where such receipt and delivery is connected with system-line hauls of the carriers. (Rec., No. 431, 49.)

We thus see that the conclusion of the commission that the charge of $2.50 is unjust is not a conclusion of law, but is, instead, a conclusion of fact based upon a multitude of minor facts, and we also observe that the Commerce Court was mistaken when it said that the commission had not found that the charge of $2.50 was "discriminatory in any way." On the contrary, we respectfully submit that the report of the commission clearly shows that the commission based its order entirely upon the discriminatory character of said charge. It assumed that the charges

exacted by the carriers for transporting the traffic to and from Los Angeles and San Francisco were reasonable, and that if the switching charge of $2.50 were to be considered by itself and without reference to the through rates that, too, would be reasonable, but that the switching charge could not be so considered because it covered the carriers' services for receipt and delivery on industrial tracks, which receipt and delivery are also included in said through rates. In other words, the commission found that the carriers, by charging rates to and from points within their switching limits at Los Angeles and San Francisco from and to points outside of the State of California which were greater where traffic was received or delivered upon said industrial tracks than where it was received or delivered upon said team tracks or at said freight sheds, constituted an unjust discrimination, which is a violation of section 2 of the act to regulate commerce, since in each instance the traffic was transported by the carriers over the same line, in the same direction, and between the same points, and the services performed by the carriers in connection with said transportation were like and contemporaneous and performed under substantially similar circumstances and conditions.

In the case of *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co. et al.*, 220 U. S. 235, a majority of the commission had found that certain carriers, by enforcing a rule whereby a less charge per 100 pounds for transportation was exacted where the traffic in the car was

all owned by one party than where there was a diversity of ownership, were guilty of unjust discrimination, while a contrary finding was made by a minority of the commission, and upon trial of the case in the Circuit Court that court adopted such finding of the minority and entered a decree annulling and setting aside an order of the commission which had been based upon said finding of the majority, but this court reversed the decree of the Circuit Court, and in that connection said:

> The finding of the commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to re-examine. (Id., 255.)

We are unable to distinguish between the finding of unjust discrimination in this case shown by the language of the commission above referred to and the finding of unjust discrimination in said Lackawanna case, and therefore conclude that, in substituting its own judgment for the judgment of the commission and finding that the charge of $2.50 per car is not unjustly discriminatory, the Commerce Court acted beyond its power.

We say the Commerce Court substituted its own judgment for the judgment of the commission and found that the charge of $2.50 was not unjustly discriminatory, notwithstanding that in the opinion of the court it is stated that the commission made no finding that said charge was discriminatory in any

way, because we have shown that the conclusion of the commission was based upon the discriminatory character of said charge, and have further shown that the conclusion of the Commerce Court was in opposition to the conclusion reported by the commission. Also we have seen that the Commerce Court was of opinion that the commission had found that the services of the carriers in receiving and delivering traffic on the industrial tracks was the same as the services of the carriers in receiving and delivering traffic on the team tracks and at the freight sheds, and that this, together with the commission's finding that the industrial tracks constituted a part of the carrier's terminal facilities, formed the basis of the commission's conclusion that the charge of $2.50 was illegal and unjust. It is therefore apparent that, even as stated by the Commerce Court, the findings of the commission are findings of discrimination.

However, the Commerce Court says that in this case the findings of the commission are based upon undisputed facts, and that under such circumstances the ruling of this court in the Lackawanna case does not apply. It said that where the matter to be determined was whether the allegations of fact contained in a petition of a carrier filed in court for the purpose of obtaining a decree annulling and setting aside an order of the commission constituted a cause of action, such facts must be taken to be true, even where they are in conflict with facts stated in the

commission's report, which is made a part of the order and also a part of the petition.

If this be true, it is apparent that the aforesaid ruling of this court may be disregarded until after the Commerce Court has exercised the power which this court says it does not possess. It seems clear to us that if the Commerce Court has no power to review conclusions of the commission like those here referred to it has no power to inquire into the minor facts upon which those conclusions are based for the purpose of ascertaining whether or not the conclusions are correct.

It is true that the commission said that the industrial tracks are a part of the terminal facilities of the carriers, but it is also true that the Commerce Court has not found or held to the contrary. However, it will be seen that the Commerce Court was in error when it said that the commission found that the service for which the charge of $2.50 is made is the same service as that which is performed by the carriers in delivering freight at their depots or team tracks. As we have shown above, what the commission said was that the service upon the industrial tracks as compared with the service at the freight depots and team tracks was a like service, and, as manifested by the commission's report, this conclusion of fact is based upon a very large number of minor facts reported by the commission. If the subject matter to which the allegations of fact contained in the petitions relate is not open to review in

court we can not understand how showing that such facts are undisputed confers upon the court jurisdiction it would not otherwise possess.

But how can it be said that the minor facts upon which the commission's conclusions of fact are predicated are undisputed where such minor facts as stated in the petition are in absolute conflict with the facts included in the commission's report, which is not only a part of the petition but also a part of the order attacked by the petition?

In this connection we call attention to an error made through inadvertence by the Commerce Court. The court said:

> This case has been submitted upon a motion for a temporary injunction made by the petitioners, and upon a motion to dismiss made by the United States and the Interstate Commerce Commission. (Rec., No. 431, 83.)

It will be seen that the commission did not join in the motion to dismiss referred to. (Rec., No. 431, 80–81.) On the contrary, it refused to do so and declined to withdraw its answers to the petitions which had previously been filed in the Circuit Court. (Rec., No. 430, 38–44, and No. 431, 67–73.) At the time the motion to dismiss was filed on behalf of the United States there was pending before the Commerce Court for determination the matters involved in a motion which had previously been submitted to that court by counsel for the commission and upon which oral arguments had been made, as hereinbefore

shown, and the matters covered by the latter motion have never yet been passed upon by the court.

In other words, the commission claimed a right to deny certain allegations of fact contained in the petitions without abandoning its right to insist that the facts alleged in the petitions and denied in the answers pertain to matters exclusively within the jurisdiction of the commission and therefore not open to review in court. Those matters, as hereinbefore shown, simply bear upon the question of whether the commission's conclusion of unjust discrimination is correct.

So far as the commission is concerned, therefore, the case stands like this: The commission is here contending, first, that the allegations of fact contained in the petitions and admitted in the answers do not even tend to show that the order of the commission is invalid, and, second, that the allegations of fact contained in the petitions and denied in the answers pertain, simply and solely, to a conclusion of the commission which is not open to review in court.

However, the Commerce Court appears to think that it has a right to determine whether or not any conclusion reported by the commission is correct where, in its opinion, such conclusion is based upon undisputed facts, or, where, in the opinion of the court, the commission has not given due weight to some of the evidence upon which the court may think the conclusion is, or ought to be, based. The

language of the Commerce Court in this connection was:

> So far as the finding of the commission that the industrial track service is the same as the team track or depot service is concerned, we are constrained to hold that it is not a finding which precludes this court from coming to a different conclusion upon the present record. In cases where there is a substantial conflict in the evidence or testimony upon which a finding of the commission is based, we would feel bound by the finding unless clearly and palpably against the weight of the testimony; but we do not think that this court is concluded by a finding of the commission based upon admitted facts which in no wise tend to sustain the conclusion reached. In other words, as in this case, where all the facts are undisputed, we do not think that the commission can by an ultimate finding based upon the undisputed facts preclude this court from reaching a conclusion of its own upon such undisputed and admitted facts. Where the facts are undisputed there is no occasion for facts to be found, and the ultimate conclusion of the commission is a mixed question of law and fact which certainly ought not to be held to be conclusive upon this court.

We respectfully submit that the rulings of the Commerce Court, as shown by the above quotation, and the action taken by that court in this case, are in absolute conflict with the rulings announced by this court in the Lackawanna case, *supra*. In the latter

case this court summarized the findings of the commission as follows:

> Briefly stated, the commission held, (*a*) that a carrier could not properly look beyond goods tendered to it for transportation "to the ownership of the shipment," as the basis for determining the application of its established rates, because doing so would be a violation of the second section of the act to regulate commerce; (*b*) that the fact that the carriers in official classification territory had voluntarily established both liberal carload rates and opportunities for combining various articles for the purpose of obtaining the carload rate, gave the carriers no right to discriminate by depriving one person or class of persons of the right thus granted; (*c*) that a forwarding agent was equally entitled with others to the benefit of a carload rate when published and established and that to deprive a forwarding agent of such rights would be a prohibited discrimination; (*d*) that in any view the restrictions formulated by the assailed rules were void because repugnant to the act to regulate commerce, since their enforcement as a matter of fact necessarily created preferences and engendered discriminations which the act forbade; (*e*) that this, among other reasons was the case because the enforcement of the assailed restrictions would not only create preferences in favor of one set of persons against another but would create discriminations against places and would be revolutionary in its operation upon interstate

> traffic; (*f*) that irrespective of the abstract right of a carrier to make the ownership of goods offered for shipment a basis for applying its published rates, owing to the practical impossibility of a carrier being able to adequately enforce such a rule by determining who was the owner of the goods offered, such a rule as a matter of fact would in and of itself be an unlawful preference and discrimination forbidden by the act; and (*g*) that the same principle would control as to the attempt to establish a rule applicable alone to forwarding agents, because of the practical impossibility of distinguishing one class of agents from another. (Id., 248–249.)

And in holding that none of the above findings of the commission was open to review except that based upon the legal proposition of whether a carrier has a right to make the ownership of goods tendered to it for carriage the test of its duty to receive and carry, this court said:

> As shown by the opinion of the commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition, that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to

> be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the commission is not susceptible of review by the courts. (Id., 251.)

It will be seen that the matters concerning which the Commerce Court substituted its judgment for the judgment of the commission are purely administrative in character, and, therefore, covered by the rulings of this court above shown.

The discrimination complained of in the proceedings before the commission was the action of the carriers in exacting, for the transportation of property between certain points when the property was received or delivered on an industrial track, so called, at Los Angeles or San Francisco, a charge greater than the charge contemporaneously exacted for the transportation of the same kind of property between the same points where the property was received or delivered at Los Angeles or San Francisco on a track other than an industrial track, and after a thorough and exhaustive investigation into the pertinent facts, circumstances and conditions, including the cost to the carriers of performing the different transportation services, the commission concluded that the discrimination, and the charge of $2.50 whereby the discrimination was brought about, were unjust.

If the Commerce Court may substitute its conclusion for the conclusion of the commission as to an administrative matter like the one here in question in any case where it is of opinion that the conclusion of the commission is based upon undisputed facts, or should have been based upon evidence which, in the opinion of the court, the commission has not given due weight, it is apparent that the court can easily destroy for all practical purposes the line of demarkation pointed out by this court between administrative functions on the one hand and judicial functions on the other.

It is evident that, aside from opinions expressed by the witnesses, the evidence upon which the commission bases its conclusions of fact concerning administrative matters may be, and in many cases undoubtedly is, undisputed, and in case of a conflict in the evidence as to such matters it is plain that there would always be room for differences of opinion about the weight to be given to one portion of the evidence as compared with another; therefore, the rulings of the Commerce Court, if applied, would leave *no* room for the ruling of this court above mentioned concerning the exclusive jurisdiction of the commission in connection with the administrative matters referred to.

Also, if the aforesaid rulings of the Commerce Court were to be applied it is evident that such application would render it impossible for the commission to make use of the expert knowledge which it is sup-

posed to, and does, possess; a knowledge which it has acquired by continually making investigations into administrative matters like the one above mentioned, in accordance with the mandate of the law under which it operates.

In explaining why, in its opinion, it should be permitted to substitute its judgment for the judgment of the commission concerning conclusions of fact like those above pointed out, the Commerce Court said:

> To say that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to 7 miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, is so contrary to admitted physical facts as to be wholly untenable. (Rec., No. 431, 92.)

We submit that this statement of the Commerce Court simply demonstrates that it misconceived, or at least failed to fully understand, the question which was submitted to and decided by the commission. In its report, as above shown, the commission stated that:

> Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team

> tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over and above the freight rate named in the tariffs, while at industry spurs an additional charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the "lead" to serve other industries in the immediate neighborhood. (Rec., No. 431, 43.)

It will be seen that, without reference to the distances over which the traffic is hauled by the carriers within the switching limits referred to, no charge is made by them in addition to the through rates applied where they receive or deliver traffic upon one of their team tracks or at one of their freight sheds, and that without regard to the distance over which the traffic is hauled by the carriers within said switching limits the carriers exact a charge of $2.50 per car in addition to such through rates in each instance where the traffic is received or delivered upon one of said industrial tracks. Regardless of whether receipt or delivery upon the team tracks or at the freight sheds involved a haul within said switching limits of one-fifth of a

mile or 7 miles, such receipt or delivery was always included in the through rates mentioned, and regardless of whether receipt or delivery upon one of the industrial tracks involved a haul of one-fifth of a mile or 7 miles within said switching limits, a charge of $2.50 per car in addition to the through rate applied was exacted.

It thus appears that the matter of distance was only one of a very large number of matters which had to be taken into consideration by the commission in determining whether the discrimination complained of was unjust. For example, while the average haul may be somewhat greater where receipt or delivery is on an industrial track than where receipt or delivery is on a team track or at a freight shed, it is apparent that the cost to the carrier of establishing either a team track or a freight shed must be very much greater than the cost incurred by the carrier in establishing an industrial track, because, as hereinbefore shown (Rec., No. 431, 49), the land upon which the team tracks and freight sheds are located has to be furnished by the carrier, while the land upon which the industrial tracks are located is furnished by the industries who receive and deliver traffic thereon, and the value of land in large cities like Los Angeles and San Francisco must, in the nature of things, be a matter of great importance.

It is said that parties who receive and deliver traffic upon the industrial tracks have an advantage

over those who receive and deliver traffic on a team track or at a freight shed, because the former, by paying the additional charge of $2.50, are relieved from the necessity of draying the traffic to and from their places of business, while the latter have to pay a drayage charge of 50 cents per ton which, on a carload of fifty tons, would be $25. (Rec., No. 431, 88.)

It is apparent that this difference in expense would apply as well between different parties who receive and deliver traffic upon the team tracks and at the freight sheds as between the latter and those who receive and deliver traffic on industrial tracks, because some of the parties might be located as near to the team tracks or freight sheds as others were to the industrial tracks. But it is also evident that the carriers did not undertake, by establishing an additional charge of $2.50, to equalize the disparities above mentioned, because in order to do so it would be necessary for them to establish an additional charge which would be, not $2.50, but several times that sum, per car.

However, in the Lackawanna case, *supra*, this court held that a carrier has no right to make the amount of its charges for transportation dependent upon circumstances arising either before the traffic is delivered by the shipper to the carrier for transportation at point of origin or after it is delivered in turn by the carrier to the consignee at point of destination. The language of the court in this connection was as follows:

> It is not open to question that the provisions of section 2 of the act to regulate commerce was substantially taken from section 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. * * * Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of the higher rate for the carriage of goods for an intercepting or forwarding agent than for others. * * * And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, and certainly to the extent that its interpretation is involved in the matter before us. (Id., 253–254.)

It is further said that, although at the time some of the industrial tracks were established the parties to be served thereby did not specifically agree to pay the additional charge of $2.50, they knew such a charge was imposed by the carriers in similar cases and willingly consented to pay it. The truth of this

statement is denied, but we do not think the question of whether the statement is true is a matter of any importance because the charge was first imposed long before the act to regulate commerce was passed and when, practically speaking, shippers were compelled to accept and pay any charges the carriers saw fit to establish and exact. It appears, however, that prior to the passage of the Hepburn Act much discrimination existed in the premises not only between different shippers but also between the different classes of commodities shipped. In this connection the commission, in its report, said:

> It appears that the same charge for such delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city. It was first imposed by the Southern Pacific, and as the other lines came in they adopted the policy of the line already there. As to certain commodities such charge was not imposed until quite recently and at all times, until the Hepburn Act went into effect, there was great variation in the charge as between individual shippers. (Rec., No. 431, 446.)

It may be contended that in this case the commission was unduly influenced by its knowledge of conditions existing in the United States outside of Los Angeles and San Francisco, because the commission in its report has shown that the discrimination which is the subject matter of said order is practically unprecedented. In this connection the commission said:

* * * Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a special, and generally in practice an exclusive, railroad depot for the carload freight of a particular shipper. There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroads to develop traffic and facilitate its movement by the construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the sawmill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is, in fact, a necessity to both the carrier and the shipper under modern conditions of business and transportation.

We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities

of these carriers. In saying this we are fully conscious of the authority of the Alton case (*Chicago & Alton* v. *United States*, 156 Fed. Rep., 558) and the General Electric and Solvay Process cases, 14 I. C. C. Rep., 237, 246. Such industrial spurs as are here considered, however, are of a totally different character and of a different nature from those considered in these three named cases. They correspond rather to the railroad tracks leading to the interchange tracks with such industries, and the switching movement given by the carriers without extra charge to such interchange tracks passed unquestioned in the above cases. It was assumed by court and commission that there was no violation of law in placing a car at a point where an industry engine could connect with it and take it within the plant. But in Los Angeles there are no tracks of this character. Each of the spurs here considered is in a real sense a railroad terminal at which the carrier receives and delivers freight. In recognition of such relationship the carriers of the land universally treat such industry spurs as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in. To this generalization, covering perhaps ten thousand cities and towns in the United States, the defendants could name but three exceptions, the cities of Los Angeles, San Francisco, and San Diego. In these an additional charge is made for track receipt or delivery. When asked why this charge was made at these points, the traffic manager of one road replied,

> "Because we can get it." Another railroad official explained the nonexistence of such a charge at all other points upon his own line, as well as throughout the country at large, by saying that the absence of such charge was a "tribute to competition." (Rec., No. 431, 45–46.)

But if such a contention is advanced it may be answered in the language of his honor, Judge Mack, who in his dissenting opinion in this case said:

> In my opinion the finding of the commission, that the industry-track service in the city of Los Angeles is substantially the same as the team-track and depot service, is binding upon this court. I agree that this court should not be concluded by a finding of the commission, based upon admitted facts which in no wise tend to sustain the conclusion reached, but in my judgment the facts in this case, as related by the commission in its report, fully justify its conclusions.
>
> * * * * *
>
> If, then, these industry tracks are, as the commission in my judgment correctly finds them to be, terminal facilities of the railroad, and if, as the commission further finds, the service for which the charge in question is made is substantially the same service as that which is performed by the carrier in delivering freight on its team tracks, the commission was justified in prohibiting, as an unreasonable practice, the additional so-called switching charge made for the delivery at the industry tracks.

While under the American practice, as distinguished from the English practice, the transportation rate has always included the charge for the use of the ordinary terminal facilities—that is, the use of depots or tracks for the purpose of delivery—it may well be that the commission has the right, in regulating the practices of the carriers, to require a separation of the transportation rate into its elements. It may well be that the dangers of undue preferences and unjust discriminations in favor of large industries, which can afford to have industry tracks, may not only justify but in the future require the commission so to act, and that, too, despite the common-law principle enunciated in *Covington Stock Yards* v. *Keith*, 139 U. S., 128, and conceded in complainant's brief in the following language: "Of course, it may rightfully be assumed that the charge established by the carrier for carrying goods to and from the given cities does necessarily embrace the use of instrumentalities which the carrier must furnish to accomplish the carriage, such as engine, cars, the railroad and the depots and delivering yards, where goods of the public in general may be received and delivered. In other words, a double charge may not be imposed for the same thing."

If such action should be taken, shippers located on industry tracks, whose cars go directly from the breaking-up yards to these tracks, could not be compelled to pay for the use of the team track terminal facilities, but on the other hand they could be compelled to pay

for the use of terminal facilities on the industry tracks. We need not now determine whether, in that event, a higher rate for industry than for team-track delivery could be permitted or compelled if the cost of such delivery to the carrier were the same, in order to prevent the large shipper located on an industry track from gaining such advantage as would naturally accrue to him from his location.

The commission, however, has not yet attempted to exercise this possible power. It has acted on the basis of the long established American practice, which it was justified in assuming would be continued. Under that practice the shippers on industry tracks pay a delivery charge in the regular transportation rate. Nothing in the order sought to be enjoined compels the railroads to continue to maintain the industry tracks or to make delivery thereon. If, however, they voluntarily make delivery thereon, instead of on their other tracks, they are prohibited from exacting additional compensation for a service found to be substantially the same as that for which payment has already been made.

Moreover, nothing in the order prevents the railroads from making different transportation charges to the various depots or tracks in the city. A difference of seven miles in the length of the haul might under some circumstances justify a difference in the transportation rate. That rate, however, is not in question on this record. Moreover, this extreme difference in the length of some of the hauls does not, in my

> judgment, justify the court in holding as untenable the finding of the commission, based on a careful consideration of all the physical and economic conditions, that industry and team-track delivery in these cities are practically identical.
>
> The conclusion of the commission is, in substance, that in as much as under the American practice no separate charge is made for team-track delivery, but only a single charge for transportation, including delivery, a separate charge for the similar, no more costly, and voluntarily substituted spur-track delivery is an unreasonable practice. An order prohibiting the charge is, in my judgment, within the powers granted to it under section fifteen of the act to regulate commerce. (Rec., No. 431, 94, 95–96.)

Decisions rendered by this court since the passage of the Hepburn Act clearly show that, where called upon to suspend or set aside an order of the commission based upon a discrimination found by the commission to be unjust, the duty of the court does not include a right to determine whether the finding of the commission is correct. If the question of whether the commission has made such a finding is put in issue the court may ascertain whether in fact such finding has been made, but it may not go further and inquire into the minor facts upon which the finding is said to be predicated for the purpose of ascertaining whether the finding itself is correct and such a finding as the court would have made, and what the court may think about whether the minor facts on which

the finding is based are undisputed is not, nor is the judgment of the court concerning the weight which should be given to the evidence upon which, in the opinion of the court, the finding of the commission is based, a matter of any consequence whatever in this connection. The judgment of the commission concerning the character of the discrimination is the thing of importance in a case of this kind, and the right of the court to review the conclusion of the commission to ascertain whether it is correct is no greater where, in the opinion of the court, the conclusion is based upon undisputed facts than it is otherwise. And the same rule of law prevails where the order of the commission requires a carrier to establish and put in force in the future a rate, regulation or practice found by the commission to be reasonable and just, in lieu of a rate, regulation or practice found by the commission to be unreasonable or unjust.

In the case of *Procter & Gamble Co.* v. *United States of America, Interstate Commerce Commission, et al.*, 225 U. S. 282, this court, speaking through Mr. Chief Justice White, said:

> Originally the duty of the courts to determine whether an order of the commission should or not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the commission, for the purpose of enforcing or restraining their enforcement, the

> courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. (Id., 297–298.)

Where a court is called upon to suspend or set aside an order of the commission the only questions which can be submitted to, and considered and decided by, the court, are questions of law, and while it is true that in order to determine a question of law it may sometimes be necessary for the court to review certain facts, a conclusion of fact of the commission can not be changed into a conclusion of law, either by showing that the conclusion is based upon undisputed evidence, or by alleging that the commission has not given due weight to the evidence or to some element or elements thereof. The conclusion of the commission here referred to is a conclusion made by the commission while operating as an administrative tribunal within the legislative field and in connection with a matter over which the legislative branch of the Government has full and complete control, therefore, the duty performed by the commission in the premises is one which has not been, and may not be, imposed upon the courts.

Procter & Gamble Co. v. *United States, supra,* and cases therein cited.

Although these are appeals from interlocutory decrees granting preliminary injunctions, the injunctions were not issued until after the matters covered by the petitions had been fully argued and submitted to the Commerce Court for determination, upon their merits. The cases were so submitted on April 11, 1911, and the decision of the court here in question was not rendered until the 20th day of the following July. (Rec., No. 430, 54–55, and No. 431, 82–83.) Also, an examination of the reasons given in the petitions in support of petitioners' conclusion that the orders of the commission are invalid (Rec., No. 430, 10–11, and No. 431, 11–12), will show that all questions of law presented by the petitioners have been passed upon by the Commerce Court. Therefore, the cases are now before this court for final disposition and can be so disposed of upon the present record.

Upon that record, and for the reasons herein given in detail, we insist that the decrees of the Commerce Court, granting the preliminary injunctions, are erroneous and should be reversed.

We therefore ask this court to reverse said decrees and remand the cases to the Commerce Court with instructions to dismiss the petitions.

Respectfully submitted.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Appellant.

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In The

Supreme Court of the United States.

October Term, 1913.

Nos. 97, 98.

Supreme Court, U. S.
FILED
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JAMES D. MAHER
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THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION,

Appellants,

v.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellees.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION,

Appellants,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Appellees.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

SUPPLEMENTAL BRIEF FOR THE SOUTHERN PACIFIC COMPANY.

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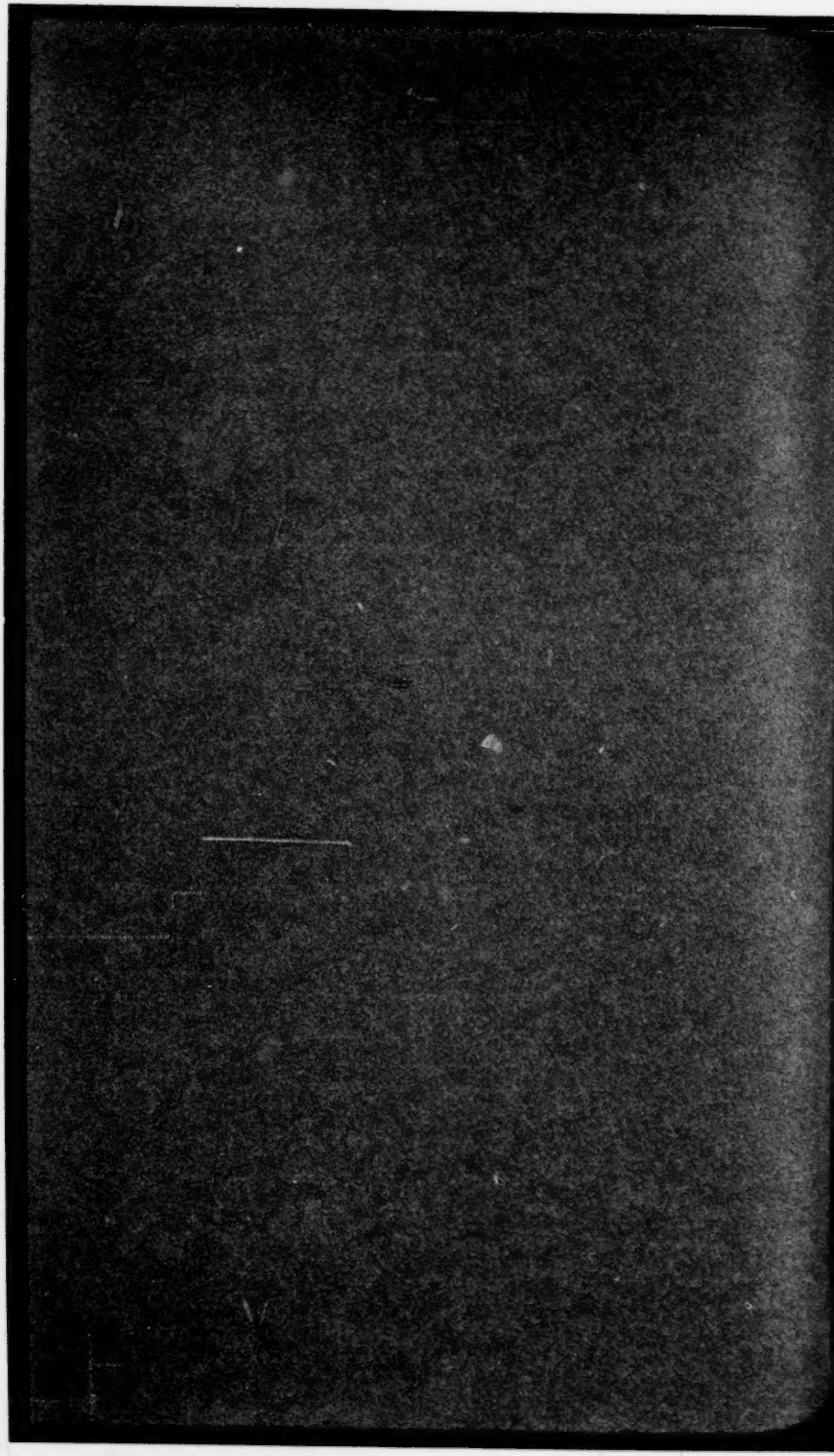

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, Appellants,

v.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellees.

No. 97.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, Appellants,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, and SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, Appellees.

No. 98.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

SUPPLEMENTAL BRIEF FOR THE SOUTHERN PACIFIC COMPANY.

Statement.

In view of the statement in the main brief of the Appellees to which this is supplemental no general

statement of the case is required. Such references to the facts as may be necessary to an understanding of the points covered hereby will be made in the course of the argument and unless otherwise stated will be understood to refer to the record in case No. 98, as both cases depend upon the same principles of law and in the proceedings before the Commission the report and opinion in case No. 97 merely referred to the opinion in No. 98 as containing an exposition of the principles upon which it was based. No attempt will be made herein to cover all of the issues of law in the case, but this brief will be confined to the following points:

FIRST. That it conclusively appears from the form of the order and the face of the Commission's report that the order is not predicated upon any finding of discrimination, but upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment.

SECOND. That such construction is erroneous.

THIRD. That in so far as the Commission's conclusion may be attempted to be based upon any assumed finding of equality of cost in team track and industry track delivery it is attempted to be based upon a finding not actually made and which if made is contrary to the undisputed evidence in the case.

FOURTH. That waiving for the moment the form of the order and evident erroneous construction of the statute upon which it is based it is conclusively shown that the tariffs of the carriers in imposing a terminal

charge for industry track delivery when made in connection with a line haul by the carrier making such delivery, while making no terminal charge for team track delivery incident to a line haul violate no provision of the act to regulate commerce; that the two services in question are not like services performed under similar circumstances and conditions and that the resultant difference in charges results in no undue preference but is justified both by the dissimilar circumstances and conditions under which rendered and by the added value of the service in connection with industry track delivery for which it is just to make an additional charge.

Although in the above specification of propositions to be discussed the expression "industry track delivery" is employed, it will be understood that the same legal principles apply to the receipt of carload freight upon industry tracks as distinguished from its receipt upon team tracks.

I.

It conclusively appears from the form of the order and the face of the Commission's Report that the order is not based upon any finding of discrimination under either the second or third sections, but upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment.

The positions of the Commission and the Government are not in accord. The Commission's brief (pages 22 and 31), asserts that the Commission's order is based upon a finding of discrimination in violation of Section

2 of the Act to Regulate Commerce in imposing a charge of $2.50 per car on shipments delivered upon industry tracks as distinguished from shipments delivered upon team tracks upon which no charge is made in addition to that named in the tariff for carriage to Los Angeles and San Francisco.

The Government's brief (p. 6), asserts that the order is based upon a discrimination against Los Angeles and San Francisco and in favor of other cities where no charge is imposed for industry track delivery.

Neither is correct. The order of the Commission shows upon its face that it is not an order to remove discrimination under either section. The opinion upon which it is based fails to disclose any finding of discrimination, but on the contrary, shows, upon its face, that the order is based, not upon discrimination, but upon the Commission's interpretation of the duty of the carrier and upon its conclusion that it has no right as a matter of law to impose a separate charge for industry track delivery although that separate charge may be separately stated and may be, as it is conceded to be, a reasonable charge for the service covered thereby.

Orders predicated upon discrimination proceed upon the assumption that the charge is in itself reasonable, as, indeed, is conceded here; but that the charge in comparison with some other charge or in the absence of a similar charge against some other person or community results in undue discrimination.

In such cases the offense of the carrier lies solely in the discrimination, that is to say in the improper relationship of its charges and the authority of the com-

mission is limited to an order to remove the discrimination, leaving the carrier at its option to bring the two situations into harmony with each other and the law by advancing one charge or reducing the other if the discrimination consist in an improper relationship between charges, or by cancelling one charge or imposing another if the discrimination result from charging for service in one instance and furnishing it free in another.

The Commission may not require the carriers to extend any service without compensation, nor can it look to the charge made for one service for any part or all of the compensation to which the carrier is entitled for another service. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.)

The order of the Commission in this case is not an order to cease and desist from making the charge of $2.50 per car for industry track delivery so long as no charge is made for team track delivery, or to cease and desist from making this charge at Los Angeles and San Francisco so long as it makes no charge for industry track delivery at other points. The order is to cease and desist from making any charge whatsoever. This order, if valid, cannot be supported as an exercise of the Commission's authority to remove discrimination, but only upon the theory that the carriers have no right as a matter of law to impose any charge whatsoever for this service over and above the charge named in the tariffs for transportation to and from Los Angeles or San Francisco, although those tariffs may, as they did in this instance, specifically establish a separate and additional charge for this service. That it is

so based and not upon discrimination is shown by the report and opinion of the Commission. In stating the issues as presented to it by the pleadings, the Commission says:

> "Complainant contends * * * that the compensation for that service is and must be included as a matter of law in the freight rate, and that the segregation of this charge is not permitted by law." (Rec. p. 43.)

Then follows a discussion of the nature of the service performed, a description of the various terminal facilities of the carrier, and of the contracts under which these industry tracks are constructed. The commission does, it is true, comment upon the general practice of American railroads to make no charge in addition to the haulage rate for either team track delivery or industry track delivery, but nowhere in the Commission's opinion does it find that the making of this charge at Los Angeles and San Francisco, which it finds has been there made for twenty-five years as distinguished from the general custom in this country, and the failure to make same at other points, constitute a discrimination against localities. The Commission's review of the practice of railroads at other points was clearly made, not as ground for finding discrimination against localities, but as a justification for its conclusion "that the rate which it is required shall be published is a complete rate, which includes not only the charge for hauling but the charge for the use of the terminals at both ends of the line" (Rec. p. 47), and for its conclusion that the terminal charges which may be

separately stated under section 6 of the act to regulate commerce, do not include charges for the receipt and delivery upon the carriers over terminal facilities. The concluding paragraph of the opinion says not one word about discrimination, but states that an order will be entered condemning as illegal and unjust the charge of $2.50 for industry track delivery (Record p. 55). Nothing could be plainer than the fact that the Commission's order is not predicated upon any discrimination, but is founded solely upon a legal conclusion that an interstate carrier in this country cannot make a separate charge for the receipt and delivery of freight at its terminals as distinguished from its charge for haulage between termini.

II.

The Commission's Construction of The Law Is Erroneous.

The first question presented, is the right of a carrier to state separately from its charge for the *carriage* of property between places, its terminal charges for the receipt and delivery of freight at these places. The Commission after commenting upon the English practice in separating the haulage from the terminal charge states:

> "This method of stating rates [English method] has never obtained in this country, at least so far as the records of this commission show. The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling but the charge

for the use of the terminals at both ends of the line.

"The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules which shall be published and filed with the commission, 'shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed,' it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of the line. The terminal charges referred to in section 6, and which must be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers." (Rec. p. 47.)

In so far as the Commission's order is based upon its construction of the statute as above set forth, it presents a question for judicial review.

The Commission's construction of the statute is clearly erroneous, because:

(*a*) it is contrary to the plain language of the statute interpreted in the light of the ordinary significance of the words employed; (*b*) it is contrary to the purpose

and scope of the statute as indicated by the history surrounding its enactment; and (*c*) [which may indeed be considered as a part of subdivision (*b*)] it loses sight of the state of the English statute and its judicial interpretation at the time of the enactment of the Act to Regulate Commerce, which is referred to by the Commission itself as one of the guides of interpretation for our statute, and has often been referred to by this Court as a similar guide because of the admitted fact that our statute was at least in part modelled thereon.

(a) *By the plain intendment of the language used, carriers performing a road service between termini may separately state the charges for carriage between places named in the tariffs and their own terminal services performed at the places between which such transportation is conducted.*

In its present form Section 6 provides as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates,

fares and charges applied to the through transportation. *The schedules printed* as aforesaid *by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall also state separately all terminal charges*, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee.*"

The statute therefore plainly provides that every charge for every service must be published. It recognizes with equal plainness that the total service performed, in the language of the statute, "by *any* such common carrier" may consist of an aggregate of separate services, and that the charges for each of these separate services may either be stated separately or stated in the aggregate, but that in the event they are stated in the aggregate all privileges or facilities granted or rules or regulations which in any way affect or determine the value of the service rendered must be shown.

It is not contended that this statute requires that the carriers must separately state charges for the various services performed with respect to a given shipment, the aggregate of which constitutes the whole service performed by the carrier with respect thereto, but the statute plainly contemplates that the carrier may or may not so separate its charges, at its option; but that if it

does all charges in addition to the charge named for carriage between the places named which in any wise change, affect or determine any part or the aggregate of such aforesaid rates shall be published. Under the section as worded a carrier may at its option name a single lump charge for transportation and for icing, or it may separately state the charges for each. Likewise it may name a single charge to cover carriage between the places named and the terminal services performed, or it may separate those charges.

What, then, are the terminal services for which terminal charges may be made? The Century Dictionary, Volume 7, page 6242, gives as the first definition of the word *terminal:* Of, pertaining to, or forming a terminus or termination of something; as, the terminal facilities of a railway.

Section 3 of the Act to Regulate Commerce recognizes clearly the distinction between terminal facilities and main lines used for the carriage of freight, wherein it provides for the interchange of traffic between respective lines and prohibits discrimination as between connecting lines, but contains the saving clause: "This shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." The terminal facilities of a carrier, as distinguished from its tracks involved in the haulage of freight between stations, consist of its freight and passenger depots, side tracks, team tracks and all other instrumentalities used at the terminal in the receipt, delivery, storage or handling of freight. These terminal services are as necessary to the conduct

of the carrier's business as its main line and tracks ; but both in common parlance and under the Act to Regulate Commerce as reflected in Section 3 they are regarded as a separate and distinct class of facilities from the main line tracks. In view of this fact, the simplest and most reasonable construction of the expression *terminal charges* as used in Section 6 would mean charges for services performed on the carrier's terminal facilities as distinguished from services performed in the carriage of property between places.

Without regard to dictionary definitions or the recognition of terminal facilities as distinguished from main line tracks contained in Section 3 of the Act, it is a matter of common knowledge that in the transporta- of property by carriers the services performed may be divided into two main sub-divisions : the haulage of the freight between termini, and the services at the termini.

By the plain intendment of the language used the Congress intended that the carrier might state separately its charges for these two general classes of service. If, indeed, it does not permit this then the provision is of no meaning whatsoever. The Commission seems to have confounded the extent of the aggregate service which it is the duty of the carrier to furnish with the separation of charges for the component parts thereof and to assume that as a part of the carrier's duty is to make delivery at its terminal, the charge therefor must be included in the rate named for carriage between places. It will not do to say that the charges for services in respect to receipt and delivery of freight must be included within the charges named for the carriage of

property between places because it is a part of the transportation duty of the carrier to provide a place for the receipt and delivery of that freight as well as to carry it; for under the statute it is as much the duty of the carrier to furnish as a part of the transportation, and not as an independent service, icing, elevation, storage and handling of property, yet it will not be contended that the charges for these services when performed by the carrier performing the service of haulage or carriage may not be separately stated in the carrier's tariffs, and, indeed, the opinion of the Commission so concedes. (Rec., p. 47.) It is no more the duty of the carrier to furnish depots or tracks for the receipt and delivery of freight to be carried between the places named in its schedules than it is to furnish icing and refrigeration. The question is not how much service in the aggregate is the carrier required to perform, but whether it may separately state its charges for the several component parts of that aggregate service, which the statute plainly says it may do, and includes within the statement of charges which it may so separately state all terminal charges which may be imposed. But the Commission says that while terminal charges for the switching of cars at termini may be separately imposed when that switching is done by some line which has not performed a road service, no separate charge may be stated therefor when performed by the road line. The switching of the car is a terminal service, by whomsoever performed. The charge therefor is a terminal charge, by whomsoever made. The statute, so far from making the impo-

sition of a separate terminal charge depend upon the intervention of an independent terminal carrier, requires that any such common carrier (that is, any carrier engaged in interstate transportation) shall separately state the places between which property and passengers will be carried and all terminal charges which may affect the aggregate of the charges to be imposed: clearly contemplating the right of the carrier to separately state its own terminal charges if it chooses to do so.

Furthermore no direct provision for the separation of terminal charges from line charges was required in order to provide for the publication of rates to cover property carried to a given place by a given carrier and there delivered to a connecting terminal line for delivery upon a track or at a depot located upon the terminal line. Property handled by switch movement within a given city to affect delivery of a shipment which has moved into that city by another line is interstate commerce. (*McNeill* v. *Southern Ry. Co.* 202 U. S. 543.) When any two lines unite in the interstate transportation of property from point of origin to ultimate destination, whether the services of one of those lines be merely a switching service at point of origin or destination or whether it also comprehends a road haul, the manner in which the charges therefor are to be published is amply taken care of by other provisions of the statute which require that if a joint rate be established to cover the services of both lines it shall be published as a joint rate and filed with the Commission, and that where no joint rate has been established the total charge to be made shall be the

sum of the separately established and published charges of the several carriers. No separate provision therefore, looking to the separation of terminal charges from other charges, was required in order to provide for the publication of terminal charges imposed by a connecting switching line to be added to the charges named by the road line for the carriage of property between termini. In the absence of any provision looking to the separation of terminal charges, the connecting switching line must under the statute separately state its terminal charges, which are to be added to the road charges of the road line. It is therefore clear that the purpose of the provision under discussion was to permit the separation of the charges of a carrier performing both haulage and a terminal service as between those separate services performed by it, and that, in the language of the statute, those terminal charges which may be separately stated comprehend all terminal charges for all terminal services,—that is, for all services performed on the terminal facilities of the carrier. Under the literal construction of the statute in accordance with the ordinary acceptation of the words employed, its meaning is plain, and permits the separation of charges for all terminal services from the charges for the service of carriage between places. Where the meaning of the statute construed according to the literal significance of the words employed is plain, the courts will not by construction give to that statute a strained and unnatural meaning by disregarding the plain import of the language employed.

(b) *The Commission's construction is contrary to the purposes and scope of the statute as shown by its legislative history.*

The Act to Regulate Commerce grew out of a Senate Resolution of March 17, 1885, appointing a committee to investigate and report upon the subject of the regulation of railroad carriers and empowering the committee to summon witnesses. This committee reported on January 18, 1886, transmitting as a part of its report a complete printed transcript of the testimony taken by it, reference to which shows that in its investigation the committee had in mind the distinction between the terminal and haulage services of a carrier in connection with a given shipment and the propriety of a separation of the total charges as between the two. (Senate Report No. 46; 49th Congress, 1st Session, No. 2, pp. 892 to 894, 1084, 1161, 1256). Accompanying the report was Senate Bill No. 1093, 49th Congress, 1st Session, recommended by the committee for passage. Section 5 of this bill provided:

> "That every common carrier * * * shall * * * file * * * copies of all their tariffs of rates as well as all classifications, conditions and terminal charges which in any wise change, affect or determine any part or the aggregate of such tariff of charges and from time to time of changes in the same."

In the bill as finally passed (24 U. S. Statutes, 379) the subject-matter of Section 5 became a part of Section 6 and was changed to read:

> "That every common carrier * * * shall print and keep for public inspection schedules

> showing the rates, fares and charges for the transportation of passengers and property which any such common carrier has established, etc. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried * * * and shall also state separately the terminal charges and any rules or regulations which in any wise affect or determine any part or the aggregate of such aforesaid rates and fares and charges."

So far as the point in issue here is concerned, therefore, the change in the phraseology of the bill in its passage through Congress only served to make clearer the distinction between the charge *for carriage between places* and *the terminal charges* which might be added thereto at the termini for services rendered by any carrier subject to the act.

In 1906 the statute was again amended substituting the word "all" for the word "the", and permitting the separation of all terminal charges which might affect the rate still further evidencing the continuing intention of Congress that "any common carrier" might separate the charges for its aggregate service into separate charges for the various component parts of that service.

(c) *The Commission's construction is contrary to the construction of the English act at the time of the passage of the Act to Regulate Commerce.*

This court has frequently said that our law was modeled after the English statute, and that it would be

assumed that the courts had adopted the construction of similar provisions in the British law.

At the time of the passage of the Interstate Commerce Act in 1887, the English Railway Act of 1873 was in force. This act permitted, but did not require the separation of charges between charges for carriage or conveyance between places and terminal services. It also (Section 15) gave the Commission power—

> "To hear and determine any question or dispute which may arise with respect to the terminal charges of any railway, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery and other services of a like nature," etc. (*Boyle & Waghorn's Law Relating to Railway and Canal Traffic*, Vol. 2, p. 258.)

In *Hall* v. *London, Brighton & South Coast Railway Company*, 15 Q. B. D. 505, decided January 30, 1885, it appeared that the charter of the carrier required it to perform for a single maximum charge the service of conveyance and all services "incidental to conveyance", but permitted the imposition of additional charges for "services *incidental to the business of the carrier*" but distinct from the conveyance of the property between places named.

The court held that charges for station accommodations, the use of sidings, weighing, checking, clerkage, switching and labelling were not services incidental to conveyance but services incidental to the business of the carrier for which a charge additional to the charge for conveyance might be made. These charges are throughout the opinion of the court

designated generally as terminal charges over which the English Commission had been given jurisdiction under the section of the statute above referred to. It thus appears that at the time of the passage of the Interstate Commerce Act the phrase terminal charges as contained in the British statute had been construed so as to include the use of sidings for the receipt and delivery of freight, and that these charges had been judicially distinguished from charges for conveyance and services incidental thereto. Carriage and conveyance are, of course, synonymous, and in providing for the statement of places between which property will be carried and also for the separate statement of terminal charges our statutes made the precise distinction between the two classes of service made by the English law as construed by the English courts.

(d) *In the construction of this statute no assumed custom of embracing within a single charge compensation for these two services can weigh against the plain reading of the statute and the contemporaneous construction of similar provisions in the English law.*

The report of the Commission comments at length upon what it calls the "American custom" of naming a single charge to comprehend all services. So far as the custom in California is concerned it is stated by the Commission that the separation of this charge has been made as long as the carriers have had access to Los Angeles (Record p. 46). Furthermore, the Act to Regulate Commerce was not passed to perpetuate but to correct the customs of the carriers. No existing

custom of theirs can control the plain reading of the statute, particularly in the light of the history of its enactment, and the judicially construed provisions of the English law upon which it is modeled.

III.

In so far as the order is predicated upon any assumption that the cost of team track delivery and industry track delivery is the same, it is based upon an assumption warranted by no finding of the Commission, contrary to the undisputed evidence before the Commission, and contrary to the specific allegation of the petition, admitted by the motions of appellants, that the cost of industry track delivery is greater than the cost of team track delivery.

The only direct reference to the relative cost of public delivery upon the carrier's team tracks and private delivery upon industry tracks in the opinion of the Commission is the following sentence:

> "After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery." (Rec. p. 49.)

Considerable stress is laid upon this statement of the Commission by both the Government and the Commission in their briefs. We do not understand it to be contended, however, that the order is predicated upon this finding. The real foundation of the Commission's order, as plainly shown by its opinion, is that these industry tracks, although found by the Commission to

be constructed and operated not by virtue of any requirement of law but under private contracts, and although found by the Commission to be in each instance "a special and generally in practice an exclusive railroad depot for the carload freight of a shipper (Record, p. 45)," are for the time being a part of the terminal facilities of the appellees; that receipt and delivery thereon are substitutes for receipt and delivery upon public facilities of the appellees, and that therefore no additional or different service has been rendered for which a separate additional charge maybe made, but that delivery upon public team tracks, which it is the positive duty of the carriers to make, is a like service as delivery at these private depots for particular shippers which the law of common carriers does not require shall be made but is voluntarily made under contract. We do not understand that there is any pretense that this conclusion is based upon any assumption that the cost of the two services is the same, but that the statement that the Commission cannot find that the cost is any different is merely incidental to the main finding that the services are like services. As will presently be shown the legal quality and character of these services and their likeness in law or in fact cannot be determined by the question of comparative cost, but only by the nature of the service itself, and the circumstances and conditions under which it is performed and the purpose for which it is performed. But in so far as it may be urged that the order of the Commission is based either in whole or in part upon an assumption that the cost of the two is alike, it is based upon an

assumption that has no predicate in the findings of the Commission. Under the law as construed by this Court all charges made by the carriers are presumptively lawful and right, and the burden is upon the complainant before the Commission to show that they are in violation of some provision of the Act to Regulate Commerce. *Interstate Commerce Commission* vs. *Chicago Great Western Railway Company*, 209 U. S. 108.

This presumption can only be overthrown by the production of competent evidence before the Commission, and the Commission must first find upon the record that a violation exists, and the evidence of this violation must be found in the record made before the Commission itself and cannot be the result of conjecture or fiat. *Interstate Commerce Commission* vs. *Louisville & Nashville Railroad Company*, 227 U. S. 88–100.

If the legality of this charge, therefore, depends either in whole or in part upon equality of cost in the two services, then it was incumbent upon the complainants before the Commission to show, and upon the Commission to find by competent testimony that the cost was the same. The finding of the Commission falls far short of this requirement. It is not an affirmative finding that the cost is the same. It is rather a negative finding that the Commission cannot find from the whole record that the cost is different. Nor is this a mere quibble over words or phraseology. If there were no testimony whatever on the subject or if the testimony offered was unsatisfactory and lacked that

definiteness and certainty necessary for the ascertainment of actual comparative cost, the Commission might well say that it could not find that the cost was the greater, but such a finding could not be made the predicate for an order to cease and desist from making the charge if the illegality of that charge depended upon equality of cost of the two services; for it would be incumbent upon the complainants in such a case to show that the cost was the same, and if the record were silent upon that point or the testimony unsatisfactory, the Commission would have no right to piece out the insufficiency of the record by its own conjecture or opinion.

In the *Minnesota Rate Cases*, 230 U. S. 352, and *Missouri Rate Cases*, 230 U. S. 474, in which the legality of the charges made by the State depended upon the relation between the rates fixed by the state and the cost of service, this Court held that the question of cost was not a matter that could be determined by expert evidence or expert opinion, but that the question of cost was a question of fact, which could be determined only by the accurate segregation of operating expenses among the several classes of services rendered; and that rates fixed by public authority thereunto duly authorized and presumptively lawful could not be overthrown except upon competent proof of cost definitely and accurately ascertained in a proper manner. It would indeed be a remarkable construction of the law to say that where the legality of a carrier's charge, which is presumptively as lawful as the charge fixed by a State legislature, is dependent upon

the cost of performing the service for which that charge is made as compared with the cost of performing some other service, the issue of cost thus raised may be decided upon evidence any less clear and definite than is required where the rate is made by the State and the burden is upon the carrier to show the cost. If cost is the issue, then the rule for the ascertainment of that cost must be the same whether the carrier be the complainant or whether it be the defendant, and the conjecture or expert opinion of the Commission upon the issue cannot be substituted for definite and certain evidence any more than can the expert opinion of railroad presidents and experienced railroad officers whose expert opinion on the subject is certainly entitled to as much weight as that of an expert rate making tribunal.

If, therefore, this charge is legal if the cost is greater than that involved in team track delivery, but illegal if the cost is the same, it was incumbent upon the complainant to show that fact and upon the Commission to find that fact before the charge could be condemned, and the making of such a finding not upon conjecture but upon competent evidence would be jurisdictional to the making of the order.

The statement that the Commission cannot find that the service is more expensive than if all cars were given team track delivery falls far short of a finding that it is not more expensive. To say that the Commission cannot find that the cost is more expensive is merely to say that it is unable to find from the record that it is more expensive. But if the legality of the charge

depends upon equality of cost, it is not essential that the Commission be able to find from the record that the cost is more expensive. There was no obligation upon the carriers to show that the expense was greater. The burden was upon the complainants to show that the cost was equal. A statement that the Commission was unable to find that the expense was greater, therefore, could not be made the predicate of an order to cease and desist from making the charge, because it proceeds upon the assumption that there was some duty upon the carrier to prove the extent of the additional cost, whereas it was essential that the complainants should prove and the Commission should find that the cost was the same. It is quite a different thing to say that one cannot find from a record that a certain fact exists, than it is to say that one finds from a given record that a certain fact does not exist.

Even if the Commission's statement that it cannot find from the record that industry track service is more expensive to the carrier than if *all* cars were given team track delivery is considered as a definite finding that the cost is the same, any order predicated thereon in this case is void because contrary to the undisputed testimony. The appellees by their motions admitted the truth of every material averment in the bills of complaint. Those bills alleged that the public team tracks were sufficient in size to accommodate all shippers of carload freight; that connected therewith the carriers owned land sufficient to receive and deliver twice the amount of carload freight now handled; that these teamtracks are connected with

the main tracks of the carriers, while the industry tracks are located from 200 feet to seven miles distant from their main tracks; and that to deliver cars upon industry tracks it was necessary to move them from the main tracks of the carriers to the industries to which destined, and after the car had been unloaded in many instances to remove the empty, while in the case of outbound shipments it was necessary first to move an empty from the yards and main tracks of the carriers to the industry and then, after loading, switch the car from the industry track to the yards where the trains are made up. Any finding of the Commission contrary to the undisputed evidence is void, and allegations of what that undisputed evidence was are therefore material allegations and hence admitted by the appellees' motions. Indeed, the opinion of the Commission itself finds that the district within which these industry tracks are located is six or seven miles in length (Rec. p. 43). Under these undisputed facts a finding that the cost of delivering upon industry tracks is no greater than if all cars were given team track delivery is clearly contrary to the undisputed evidence.

A statement that the cost of delivering cars upon tracks connected with the main tracks is the same as the cost of delivering cars on tracks from 200 feet to seven miles distant from the main tracks is in itself so contrary to all reason and common sense as to be no finding of fact at all, but merely administrative fiat.

Furthermore, even if the average distance hauled to team tracks and to industry tracks were the same, it is

self-evident that to deliver a part of the cars upon industry tracks and a part of them upon team tracks is more expensive than it would be to deliver all of the cars upon team tracks. The Commission states that a train of freight cars goes first to the breaking up yards where it is divided up with respect to the character of the freight in the various cars and their destination (Rec. p. 49). Without this finding of the Commission, we think that the Court would take judicial notice that the final delivery of cars in large cities like San Francisco and Los Angeles cannot be made upon the tracks upon which the train is first placed upon its arrival. The various cars in the train must obviously be separated as between cars loaded with less than carload freight to be unloaded at the freight house, cars going to connecting lines, cars to be placed in outbound trains for transportation beyond, and cars containing carload freight for track delivery. Obviously this carload freight cannot be delivered upon the tracks at which the train is broken up, as the cars must be moved and shunted about until the several separations necessary have been made. It is equally obvious, however, that if a part of the carload freight is to be given track delivery on team tracks and a part upon industry tracks, additional switching service is required in the breaking up yards from that which would be required if all carload freight were to be placed upon a single team track or a yard of connected team tracks, for there must be a further separation of the cars as between those taking team track delivery and those taking industry track delivery, either in the breaking up yard or somewhere else.

Furthermore, if all cars were to be delivered upon the team tracks they could be placed there by a single movement of the engine and cars, placing the entire string upon the team track at one time; whereas, if deliveries are to be made partly upon the team track and partly upon industry tracks, those cars to be placed upon the team track may be so placed by a single movement of the engine, while each car or set of cars to be placed upon industry tracks requires in each instance a separate switching service.

To illustrate, let us assume the arrival of a train at Los Angeles containing, with other cars, 40 cars of carload freight, 20 for 20 different consignees for team track delivery, and 20 for 20 different consignees having industry tracks. Let us assume also that the average distance to the industry tracks is the same as the distance to the team tracks. The 20 cars for team track delivery may be moved at a single time to the team track and placed thereon with a single turning of the switch and a single movement of the engine. In the peddling of the 20 cars for industry track delivery a separate switch movement is required for each car, involving the stopping of the train, the throwing of the switch, the uncoupling of the car from the rest of the train and frequently the uncoupling of the engine, the spotting of the car at the industry, the re-coupling of the engine, the throwing of the switch back to the line up the main track, with a repetition of this performance for the delivery of every car; all of which takes time, consumes fuel, costs money and increases the wear and tear upon equipment and track.

These are matters of common knowledge. Any finding that the cost of delivering these 20 cars separately upon 20 separate industry tracks is the same as the cost of delivering the 20 cars destined for team track delivery, is against all human intelligence; and certainly the cost is of necessity greater than it would be to deliver all 40 cars upon the team tracks at one time. Even if we assume that the 40 cars start from the yard together and the 20 are delivered upon the team tracks and the other 20 upon 20 separate industry tracks, the cost of the entire movement must be greater than and cannot be the same as though the entire train were delivered upon the team tracks. Industry track switching requires the spotting of every car at the door or loading or unloading platform of the industry. Team-track delivery requires merely the delivery of the cars indiscriminately upon the team tracks where the shippers come and unload their freight. It is the difference between wholesale and retail switching delivery, the difference between wholesale and retail service, and this Court held in the *Party Rate Case, Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 284, that it would take notice of the fact that business could be done by wholesale more cheaply than by retail. Even though a railroad company may have two or three team-track yards in the same city it is self-evident that the cost of delivering all cars thereon would be less than to perform the peddling service involved in delivering on innumerable industry tracks.

There is furthermore the element of cost involved in the movement of the empty to the industry for load-

ing or from the industry after loading, which the bill alleges, and of which the Court will take judicial notice, is frequently required ; whereas, when loads are placed upon the team track they are available as soon as made empty for outbound loading. The Court will take judicial notice of the fact that when a loaded car is placed upon an industry track for unloading or an empty car upon the same track for loading, the engine and crew does not loiter in the vicinity awaiting the loading or unloading process in order that they may remove the car. They go on about their business and subsequently, sometimes days thereafter, must make another trip to take out the empty or the load. The engine does not, of course, under ordinary circumstances run from the yards with a single car to an industry track or to get a single car off an industry track, but picks up and distributes cars on one and the same trip, but the peddling service involved in industry track delivery must of necessity cost more money than it would if the cars were all loaded and unloaded at a single place.

The construction and maintenance of the additional tracks necessary to serve these industries is in itself an added element of expense caused solely by this service. Nor will it do to say that that if a part of the cars were not delivered upon industry tracks the carrier would be required to construct and maintain at additional expense additional team tracks; for it is alleged and admitted in this case that the team tracks are sufficient to accommodate all shippers of carload freight, and that land adjacent thereto is held by the carriers sufficient

in extent to provide public team track facilities to accommodate double the amount of business now done.

Under all of these facts any finding by the Commission to the effect that it is no more expensive to perform this peddling service upon industry tracks than it would be to deliver all cars upon team tracks is a finding contrary to the undisputed evidence in the case.

IV.

Waiving for the moment the form of the order and the evident erroneous construction of the statute upon which it is based, it is conclusively shown that the tariffs of the carriers in imposing a terminal charge for industry track delivery when made in connection with a line haul by the carrier making such delivery, while making no terminal charge for team track delivery incident to a line haul, violated no provision of the Act to Regulate Commerce; that the two services in question are not like services performed under similar circumstances and conditions; and that the resultant difference in charges results in no undue preference, but is justified both by the dissimilar circumstances and conditions under which rendered, and by the added value of the service in connection with industry track delivery, for which it is just to make an additional charge.

The facts are not in dispute. Whether under the facts stated a violation of either section 2 or 3 of the Act results, is a question of law upon which the conclusion of the Commission is reviewable by the courts.

Interstate Commerce Commission vs. *Baltimore & Ohio R. R.*, 225 U. S. 326.

United States vs. *Baltimore & Ohio R. R.*, decided December 1, 1913.

In the *Import Rate Case, Texas & Pacific Railroad Company* vs. *Interstate Commerce Commission*, 162 U. S. 197–219, the court said:

> "The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that in deciding whether difference in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were like, whether the transportation was effected under 'substantially similar circumstances and conditions'."

Neither the legal likeness of services rendered nor the similarity of circumstances and conditions under which performed can be determined by comparison of their cost. In *Union Pacific Railway Company* vs. *United States*, 117 U. S. 355, the charter of the railroad company required it to transport troops "at fair and reasonable rates of compensation not to exceed the amounts paid by private parties for the same service." A violation of the railroad's duty to the Government was sought to be predicated on account of the exaction of its local fare of $78.50 for the transportation of troops from Council Bluffs and Ogden, while for transportation between the same points of passengers ticketed through from New York it accepted $54. Obviously the cost to the railroad company was the same in each instance, the transportation being over the same rails and between the same points. The court held that there had been no violation of the road's charter, as the services were not "in law identical."

In the *Import Rate Case, Texas & Pacific R. R. Co.* vs. *Interstate Commerce Commission, supra*, the court held that the services rendered in the transportation of imports from the ports to the interior and in the transportation of domestic traffic from the same ports to the same points of destination were not like services in connection with like kinds of traffic under similar circumstances and conditions, and that the acceptance of a lower rate of the former as compared with the latter resulted in no undue preference under the third section, citing *Union Pacific R. R.* vs. *United States, supra.*

Obviously the cost of the performance of these two services was the same. It must, therefore, be regarded as settled that similarity of cost, even in the performance of services between the same points and over the same rails, does not constitute likeness of service or similarity of circumstances and conditions under which performed, or, standing alone, any ground for finding of undue discrimination.

Under these circumstances, therefore, it cannot be contended that equality of cost, even if it exists, renders two services alike in law performed not over the same rails and between the same points, but performed in the one instance to and upon team tracks, and in the other instance to and upon industry tracks, located varying distances apart. The right to make a distinction in charges, therefore, cannot be made to depend upon the question of cost, but it is to be determined by a consideration of the circumstances and conditions under which each is rendered and the nature of each.

The carrier was not required at common law to de-

liver at the rails of the shipper, nor anywhere else, except at its own public stations and yards.

Fenner v. *Buffalo, etc., R. Co.*, 44 N. Y. 505.

Witbeck v. *Holland*, 45 N. Y. 13.

Chalk v. *Charlotte, etc., R. Co.*, 85 N. C. 371.

South, etc., Alabama R. Co. v. *Wood*, 66 Ala. 167.

New Orleans, etc., R. Co. v. *Tyson*, 46 Miss. 729.

State v. *Republican Valley R. Co.*, 17 Nebr. 647.

Francis v. *Dubuque, etc., R. Co.*, 25 Iowa 60.

Evershed v. *London, etc., R. Co.*, 2 Q. B. Div. 254.

No provision of the Interstate Commerce Act requires it to do so. It must provide adequate public facilities for the receipt and delivery of freight. It is not required and cannot be required by any provision of the Interstate Commerce Act to provide industry tracks for the receipt and delivery of freight at private stations, nor can it be required except by contract to operate any such tracks when constructed. It may be required to install and operate "*upon reasonable terms*" switch connections between its own tracks already constructed and industry spur tracks which may have been already built up to the carrier's right of way, but it can-

not be required to construct or operate the industry spur itself.

Section 1 of the Act to Regulate Commerce.

Winters Metallic Paint Co. v. *C. M. & St. P.*, 16 I. C. C. 587.

Ralston Townsite Co. v. *M. P. Ry.*, 22 I. C. C. 354.

Imperial Wheel Co. v. *St. L. I. M. & S. Ry.*, 20 I. C. C. 56.

But under this statute the only duty is to operate "upon reasonable terms" a clear implication that Congress regarded even this service as a special additional service for which the carrier was entitled to compensation.

Prior to the amendment of 1906, a carrier could not even be required to construct and operate such switching connection; but, having established public facilities for the receipt and delivery of freight, could demand that all freight be received and delivered thereon. *Central Stock Yards Co.* v. *L. & N. Ry. Co.*, 192 U. S. 568. And it cannot to-day be required to make delivery at the warehouse or plant of the shipper, but only to place his cars on the connection between the shipper's track and the carrier's track, and in so doing it will have effected all the delivery that the law requires. When the carrier goes beyond this and sets a car at the industry for unloading it has performed voluntarily a service which the law does not require. Obviously, in legal contemplation a service which, if extended, must be extended as a matter of favor, and a

service which may be demanded as a matter of right, cannot be regarded as like services nor as services performed under similar circumstances and conditions. To say that each is a means of accomplishing the carrier's duty of making final delivery of the freight and that, therefore, as that common object is fulfilled in each case, the services are alike, is to beg the question. Delivery made according to the mandate of the law upon a public track where the consignee must come and get his property is neither in fact nor in law a like service as compared with delivery upon the consignee's private track at his warehouse door, required by no law but voluntarily done by the carrier.

Furthermore actual additional physical services are performed in connection with industry track delivery, consisting of the additional switching service required in breaking up the train to separate cars for industry and team track delivery, additional switching service in spotting each car at the door or platform of the industry and delivering the cars one by one at each separate industry as compared with delivering all cars at one time and place.

One is wholesale delivery for the public *en masse*, the other is retail delivery for an individual shipper; and wholesale and retail services are not like services (*Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 284, *supra*).

Team track service is the delivery service of a common carrier by rail. Industry track service is the service of a peddler or a drayman, making delivery from house to house. The Court will take judicial notice of the fact

that except in a very few places the railroads of this country do not deliver packages shipped by rail at the house of the consignee, but that express companies do. Express companies, in other words, make what is commonly called store-door or house-door delivery, while railroads do not. If a man familiar with the services performed by railroads and express companies were asked whether the services they performed were or were not like services, there can be no doubt that his answer would be no; that when a package was shipped by freight he had to go to the freight house and get it, but that when it was shipped by express the express company delivered it to him at his door. And even the learned counsel for the Government and the Commission would, it is believed, have a very difficult time in convincing that man that the services performed by the railway company and the express company for him were like services. The service performed in industry track delivery is a service like unto a cartage service, not a service like unto delivery at the freight house or on the team track.

The Commission in its opinion realizes, as of course it must, that there is a difference in the service, but it says that service of store-door delivery is not an additional service but only a substituted service for delivery at the freight house or upon the team tracks; and comments upon the fact that the cars are not first placed upon the team track and then at the request of the shipper moved to the shipper's warehouse, but that the cars in the first instance go into the yards of the carriers, where the train is broken up and then are

moved directly to the team track and the industry track, respectively. The inference is plain that if public delivery was taken in the breaking-up yards of the carriers or if the cars ultimately delivered upon industry tracks were first switched to the team tracks and then switched to the industry track there would be an additional service for which the carriers would be entitled to compensation. But, as we view it, the mere manner of physical handling, or the fact that delivery upon industry tracks is substituted for delivery upon team tracks, is not determinative of the question as to whether an additional service has been performed. Obviously, for reasons already given, in large cities like San Francisco and Los Angeles public receipt and delivery of freight cannot be made upon the track upon which the train is first placed.

Nor is the fact that the carriers do not go through the idle form of first placing a car destined for industry track delivery upon the team track and then moving it from there to the industry track, determinative of the question as to whether there is an additional service rendered on these cars. The manner of handling may determine the relative cost of the two services, but it cannot be determinative of their quality.

Nor is the fact that delivery upon industry tracks is substituted for delivery which would otherwise be required on team tracks, determinative of the question as to whether an additional service has been performed. A given article or a given service may be substituted for another given article or another given service, but that does not make the two articles or services like

articles or services. Merchants are constantly endeavoring to press upon their patrons various substitutes for articles called for, but, although the use to which the substituted article may be put may be the same, we have never heard it contended that the article originally sought and that substituted for it were like articles.

Furthermore the substitution of industry track delivery for team track delivery is by no means of the essence of the service demanded or performed in connection with the former. Industry track delivery is not requested because it is a mere substitute for team track delivery. It is requested because in addition to the delivery of the freight itself, which the carrier is bound to give at some place or other, the consignee obtains as well a substitute for the cartage of the freight to his warehouse, which it is not the business or the duty of the carrier to perform. When industry track delivery is made the consignee has thereby been given two services: a delivery of the freight and the placing of that freight at his warehouse door without the intervention of a cartage service, which he would otherwise have to furnish at his own expense. It is because of this additional service which he secures that industry track delivery is requested. Industry track delivery is more than a substitute for team track delivery: it is a substitute for team track delivery plus cartage, as a result of which the consignee has obtained an additional service of value. A service which at one and the same time performs two functions and takes the place of two services which would otherwise have to be performed separately, cannot be considered a service like

unto one only of the two services for which it is substituted. The fact is it is like neither, but is *sui generis*. In the development of manufacturing processes inventive genius has produced machines which perform two or more functions for the performance of each of which separate machines were previously required. Industry track delivery, performing the functions of delivery of carrier and drayman combined, is no more like team track delivery than is one of these improved machines like either of those whose combined functions it performs.

Any construction of the second section which declares that industry track delivery and team track delivery are like services is destructive of the purpose and object of that section as hitherto declared by this Court. Beginning with the *Party Rate Case*, this Court has held that the purpose of the second section is to enforce equality between shippers over the same line, the same distance, under the same circumstances of carriage. In other words the second section was one of the remedial measures to prevent rebating or the extension of special privileges for the favored few. Indeed, it will not be denied that the principal mischief which the interstate Commerce Act was intended to cure was the granting of rebates and the extension of special privileges to the large shipping interests. The main purpose of the Act was to put the big shipper and the little shipper upon an equality.

It is admitted on the pleadings that, while the charge for industry track delivery was $2.50 per car, the cost of drayage was 50 cents a ton, or $7.50 a

car for a carload of only fifteen tons. Even under the charge of $2.50, therefore, the big shipper, with his large warehouse and private track, receives or ships his freight at less cost than does the small shipper, and solely on account of the service performed for him on this private track. We do not mean to say that the advantage which he thereby gains is an unlawful one, but the advantage is there. The imposition, therefore, of any additional charge by the carrier for industry track delivery tends to place the big shipper and the little shipper more nearly in a position of equality and is concededly in the furtherance of the main object of the Act to Regulate Commerce. If that act prevents the imposition of such charge, then the justice and propriety of making the same is a consideration which must, of course, be presented to Congress, and could not be urged here as a reason for its retention; but, unless the act clearly and unequivocally prohibits the imposition of such a charge, no strained construction of the statute should be indulged which will prevent the imposition of a charge, which when made is concededly in harmony with the general spirit of the Act to Regulate Commerce, which is to insure equality among shippers, and particularly to prevent the extension of special privileges or of rebates to the big shipper as against the little one.

It has been shown, it is believed, that to construe the expression *like services* so as to include therein both industry track delivery and team track delivery is a strained and unnatural construction, when the real substance of the two services is considered and the

legal duty of the carrier, on the one hand, to deliver upon its own premises freight offered for shipment, and of the shipper on the other hand to take possession thereof and cart at his own expense to his own warehouse, are borne in mind. Such a construction is not required by the literal reading of the statute itself, and is clearly opposed to the fundamental purpose of the statute. To say that the big and favored shipper, for whom there is performed a valuable addition to the mere delivery of the freight into his hands, which is inseparably connected with the delivery at his warehouse, and the elimination of cartage, may not be required to pay to the carrier an additional charge for this additional thing of value which he has obtained, whether the cost to the carrier be the same or not, is to disregard totally the element of the value of the service which the Commission itself has repeatedly held is one of the elements that must be considered in connection with any rate, and is subversive of the whole spirit of the Interstate Commerce Act, which requires that a shipper receiving a service of value beyond that rendered to his neighbor should pay therefor. Particularly should this be so when the additional service of value is one which the carrier is not required by law to perform. If the advantage which he gains is incidental merely to a service which the carrier is required to perform he cannot be required to pay for this incidental advantage, but when the additional service of value which he has received grows out of a service which the carrier is not required to perform it would indeed be a most remarkable construction of the act to say that it is unlawful to

make a charge therefor because by its performance the carrier has relieved itself of the duty of performing some other service of less value which the shipper does not want.

In a special report to Congress in 1903, a review of the forty years of rate making in the United States, the Commission said :

> " It was discovered early that the charges for transportation of different articles of freight could not be apportioned among such articles with regard alone to the cost of carriage. This basis of determining the charges it was found would confine to narrow limits the movement of different articles whose bulk would be made to pay disproportionately low rates.
>
> Under the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country and have a tendency to bring different sections into more intimate business and social relations could never have amounted to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded because the charge for carriage would be greater than it could bear. On the other hand the rates for the carriage of articles which, with small bulk or weight, con centrated great value would, on that system of making them, be absurdly low when compared to the value of the articles, and perhaps not less so when comparison was with the value of the service in transporting them.

> Accordingly, it was found not to be unjust to distribute the entire cost of service among all articles carried on a basis that gave greater consideration to the relative value of the service than to the cost. Such a method would be most beneficial to the country; it would enlarge commerce and extend communication, and would be better for the railroads because of the increased traffic which would be brought to them." (Commission's Report of 1903, Forty Years Rate Making in the United States, page 14.)

In re Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio Railway, 22 I. C. C. 604, Mr. Commissioner Lane said:

> "Is a rate unreasonable because it does not pay its full share of taxes, fixed charges, and dividends? At the end this is the question to whieh we come in this case. The carriers themselves having fixed these rates under the mandate of the law that they shall fix just and reasonable rates, have they justified higher rates by showing that the existing rates which they had fixed fall somewhat short of meeting all the related expenses which the carrier must bear, not only for transportation but to secure an adequate return upon its property? Let us see where this doctrine would lead. If a carrier may raise all rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then it must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such theory what would be the rate on tea or

silks, or high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so the tariffs of every railroad in the United States must suffer a revolutionary change. In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is the true meaning of the phrase 'what the traffic will bear.' It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use. In this sense what the traffic will bear and the value of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs than it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with

> the other, and one may reasonably bear a higher rate than the other upon public grounds."

The recognition of the value of the service as an element or standard of reasonable and just charges is vital. As pointed out by Mr. Commissioner Lane, to disregard the element of value of the service and impose upon all articles and all services charges equal to the cost and a proportionate share of the fixed charges and overhead expense, would be revolutionary not only to the rates of the country but to its commerce. If, therefore, the justice and legality of this charge is to be determined only by reference to the cost of the service, then one, and indeed the principal, element of reasonableness in rates or a relation between rates; viz., the value of the service, has been entirely overlooked. It clearly appears that for this service for which the carriers impose $2.50 a car, the industry track shipper has received a service which saves him an expense of from $7.50 to $20 a car for cartage or drayage, whereas the receiver or shipper on a team track must pay for this cartage or drayage in addition to the rate named for transportation to or from Los Angeles or San Francisco. In asserting that for the disproportionate value in service rendered to the two persons a difference in charges may lawfully be made, the carriers therefore are not seeking to impose unjust charges for services not rendered but are fighting for the preservation of the principle upon which their rates are constructed and, indeed upon which the Commission says it is proper that they should be constructed; viz., with regard not only to cost, but to

the value of the service—the preservation of a principle which is as essential to the commercial interests of the country as it is to its rail carriers.

So, if it be asked why, if the cost is not greater, we are not willing to perform industry track service without additional charge, we answer that upon principle, as charges are imposed in this country, we are entitled to a greater charge for a more valuable service, although the cost may be substantially the same.

Obviously, the cost of transporting one ton of valuable freight differs little if at all from the cost of transporting another ton of freight of the lowest grade and value. The difference in the rate is not charged on account of the difference in insurance risk, for the element of insurance is after all but slight. The difference in the charge is made because of the difference in the value of the service, and in this case we are entitled to the higher charge upon that ground. To make an additional charge for this additional service cannot be unjust or result in undue preference no matter what the relative cost.

There is still another reason, not probably of law but of policy, why we are interested in the principle involved in this case. The reports of the Commission are full of instances in which large industrial concerns have organized terminal railroads to perform industrial track service at their plants and then secured from the main or trunk line carriers a division of the through rate or an absorption of their switching charges, leading, as has been pointed out, to discrimination. To what extent these practices are fair and to

what extent they have resulted in discrimination it is impossible to state; but the opportunity for discrimination in favor of the large shipper, whose plant and business is of sufficient size to warrant the creation of a terminal line owned by the shipper, through allowances out of trunk line rates to these industry-owned railroads, recognized in most instances by the States of their creation as common carriers, is an ever present one; and it may well be that the simplest and perhaps the only possible solution of this vexed problem lies in the separation of the charges for industry or private track delivery from the charges for public track delivery, in which event the ownership of private tracks or of the tracks connected therewith which it is necessary to use to reach the same, becomes a matter of no importance.

It is respectfully submitted that the judgments of the Commerce Court should be affirmed.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

Nos. 97 and 98

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association,
Appellants,

vs.

Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company,
Appellees.

—

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association,
Appellants,

vs.

The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company and San Pedro, Los Angeles & Salt Lake Railroad Company,
Appellees.

} Appeals from the United States Commerce Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

Nos. 97 and 98

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association, *Appellants*, vs. Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company, *Appellees*.	Appeals from the United States Commerce Court.
The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association, *Appellants*, vs. The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company and San Pedro, Los Angeles & Salt Lake Railroad Company, *Appellees*.	

BRIEF FOR APPELLEES.

STATEMENT.

The statements of appellants are not sufficiently comprehensive.

These cases involve the correctness and validity of a ruling or decision of the Interstate Commerce Commission holding as invalid ostensibly under Section 1 of the Interstate Commerce Law a tariff

charge of $2.50 imposed under the tariffs of the respective railway companies for switching loaded cars to and from the private industries or plants located upon respective industrial or spur tracks connected with the switching and main tracks of the respective railroads in Los Angeles and San Francisco and which charge for such service, separately stated in the respective tariffs filed with the Commission, was imposed in addition to the freight rates applicable upon the respective railroad lines for transportation of commodities to and from the cities in question. The Commission determined that the same charge when imposed by one of the companies for switching a carload of freight received from one of the other lines in such city to a private industry or plant located upon its spur track was reasonable and valid.

No. 97 involves the Commission's order made in the San Francisco case, but as the report (Tr., 34, 35) refers merely to the full report of the Commission made in the Los Angeles case in No. 98 we shall refer to the paging of the record in the latter case.

These suits were instituted by appellees against the Commission on June 1, 1910, in the United States Circuit Court, District of Kansas, to enjoin two orders made by the Commission. One, as stated, in respect to the San Francisco situation and the other in respect to Los Angeles. The orders in question were made prior to the Act of June 18, 1910, which, in some respects, amended the Interstate Commerce Law and also created the Commerce Court. The Commission filed an answer verified on information

and belief and the case was then transferred to the Commerce Court where the Government and other appellants intervened, and in which the Attorney General filed a motion to dismiss. (Tr., 80.) Complaining railway companies moved for a temporary injunction, filing affidavits in support of the verified bills, which affidavits have not been transmitted to this court. The Commission moved the court to proceed to a final determination of the issues without receiving testimony or other evidence. (Tr., 79.) Solicitor for the intervenors and for the Interstate Commerce Commission joined the Government in the presentation of the motion to dismiss. The case was heard also on the motion for a temporary injunction. The temporary injunction was granted and the motion to dismiss was denied. (Tr., 96, 97.) The opinion of the court is found on pages 83 to 96, inclusive.

The pertinent facts are few and comparatively simple. As the two cases are similar, for the sake of brevity, we will refer to the Los Angeles case alone.

Each of the railway companies operates its own line running to and from Los Angeles. In that city it has its yard tracks joining the main line where trains are made up for transportation over its own line or where trains which have been transported are broken up and cars distributed. A few hundred feet from this place are located its public team tracks or yards where carload freight received from the public in general is loaded and then put into an outgoing train or where carload freight hauled over

the line is placed for unloading by consignees in general not having industrial or side track facilities. However, in a number of instances, under special contract made between the railway company and the owner of a private industrial plant or warehouse, a spur track has been constructed connecting such private plant with the leads and switch tracks of the railway company and which spur track the railway company undertakes to maintain and operate for a fixed period of time. At the time of the making of these respective contracts, and since the passage of the Interstate Commerce Law in 1887, the railway company in its filed tariffs set forth the rates on the different commodities transported to or from Los Angeles, separately stating also a provision that for the service of switching a carload of freight to or from the various industries located upon the spur tracks in Los Angeles a charge of $2.50 for such service would be added to the rate and collected.

Bill for injunction.

After alleging the establishment and maintenance in said city by each of the railway companies of their respective public freight depot buildings for the receipt and delivery of freight, the bill, among other things, alleged (Tr., 3):

> "That each of said complainants * * * have also located and established and have maintained and do now maintain what are known as 'team tracks' and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in general for the loading therein of carload freight by respective shippers in said city destined for transportation to

various points upon their respective lines or to points on connecting lines of railroad in the United States; and where also is set and placed for the unloading thereof by consignees or owners in said city who have not been favored with the private or special side-track facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere, to such owners or consignees in said city of Los Angeles; and said teaming tracks and freight sheds of said respective companies are so connected with the respective main-line tracks of the respective complainants in said city that cars loaded with carload freight may be readily transferred from said main-line tracks to said teaming tracks and sheds; and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said teaming tracks and freight sheds constitute and have constituted the places where the respective complainants receive and have heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of Los Angeles; and the same are and have been in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds and buildings above shown constitute the places established as depots or stations by each of the complainants respectively in said city of Los Angeles for the receipt, handling and delivery of carload and less than carload freight intrastate and interstate. Said facilities so established and maintained for the receipt, handling and delivery of less than carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or

at any date can be tendered. The freight sheds and team tracks established and maintained for receipt, handling, and delivery of carload freight are sufficient to handle all the carload freight coming into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of carloads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all of said carload freight can be received, handled and delivered. In addition to this each of complainants has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team tracks; so that there is no necessity in the proper conduct of complainants' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of cartage which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth; and *in the investigation had by the Interstate Commerce Commission hereinafter referred to the undisputed evidence fully established the facts herein alleged.*"

It is then alleged that each of the railway companies severally or individually entered into contracts or agreements with certain individual ship-

pers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of a spur track from the respective plant or industry in said city to and connecting with the yard tracks of the respective complainant in said city where trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company, and a part by the shipper; that such tracks were constructed to specially accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective complainant, carload freight consigned to or shipped by the owner or operator of said plant and therefrom, and thus the owner or operator of such plant or industry located upon such spur or side track was relieved from the necessity of transferring carload freight to and from said team tracks and from and to such plant or industry by dray or cart or wagon at a higher cost and greater risk; and in being accorded such spur track facility the shipper at such industry or plant was given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks; that in such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years (usually less than five) a spur track to connect such plant or industry with the railroad of the railway company; but it was generally provided also that while the railway company might make use of the proposed

track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such plant or industry, but that traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

In the Southern Pacific Company's contracts it was generally provided that the shipper would pay the cost of construction, the railway company furnishing all appliances and material; that the business of the shipper should always have preference over any other use to be made by the railway company of such tracks. The railway company was to keep the track in repair, and the shipper agreed to route all his freight over the railroad wherever the rates were as low as over other routes. In the contracts made by the Atchison Company it was generally provided that "title to the *track*," fixtures and appliances *furnished by the railway company* in its maintenance should remain its property; that the railway company might "use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the second party's business as little as possible." On termination of the contract the railway company was given the right to remove the track. Contracts made by the San Pedro, Los Angeles & Salt Lake Railroad were similar in form to those of the Southern Pacific.

It was alleged that the industries or plants under the Atchison Company's contracts were distant from the main track from 1/5 to 3¼ miles. Those on the Southern Pacific were distant from its main track from 200 feet to 7 miles; and those on the San Pedro,

Los Angeles & Salt Lake Railroad from 1/5 mile to 4 miles distant from its main track in the city.

That in order to receive a carload of freight from such plant or industry it is necessary to switch from the main track or yards of the respective complainant an empty car and set the same at such industry for loading, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is necessary to switch the same from the yards of the respective complainant over switches and such spur to the industry or plant in question and to place the same for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of the complainant.

It is then alleged that while in such contracts no specific sum was fixed or prescribed for the special service of switching in receiving or delivering freight at the plant or industry in question (as indeed could not lawfully be done, as it would have to be provided in the tariffs), yet at the time of executing such contracts the usual charge separately and specially set forth in the respective tariffs of respective complainants for making such special deliveries, or such special receipt of carload freight involving the switching service to and from such plant or industry from and to the yards of respective complainant where trains are made or broken up, had been generally established by each of the complainants at the sum or price of $2.50 per car, and had for many

years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angeles would be made, and such charge of $2.50 has generally been made, maintained, and collected from such shippers in Los Angeles for said special service.

It is then alleged that this service of receiving and delivering carload freight at the respective industries or plants instead of at the team tracks or sheds is of great value and worth much more than $2.50 per car, inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have been thus favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into; *that at the hearing before the Commission it was admitted of record by the shippers that said charge of* $2.50 *was reasonable for the service performed;* and it further appeared at said hearing that the general or prevailing charge for drayage was 50 cents a ton, making the cost to

the consignee of $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed for switching to and from the shipper's warehouse.

It is alleged that in performing such special switching service to and from each industry or plant the railway company is put to a much greater expense than if such freight were received or delivered on its teaming tracks or at its freight sheds.

Reference is then made to the tariffs of the different railway companies in which it is shown that this switching charge is distinctly and separately set forth and stated.

It is alleged that the railway companies are not legally obliged to receive or deliver carload freight at any other place in said city than upon their respective team tracks or freight sheds where carload freight is delivered to or received from the public in general; that, therefore, when they voluntarily undertake for favored shippers to receive or deliver carload freight at points on other tracks or at other points in said city they have the lawful right to make an additional and separate charge therefor.

Reference is then made to the proceedings before the Commission and to the Commission's order complained of and grounds of the invalidity of the same are set forth. (Tr., 1-13.) For information of the court, copies of the pleadings before and report of the Commission are attached to the bill as exhibits.

Complaint before Commission.

Proceedings before the Commission were instituted by complaint of Associated Jobbers of Los Angeles claiming that at the instance of the railway companies many merchants and manufacturers procured business locations adjoining or within short distances from the terminal freight yards, erecting buildings thereon within switching limits, and in many cases upon land owned by the railway company and leased to such merchant or manufacturer; that spur or industry tracks leading from such warehouses and places of business were constructed under contracts with the respective railway company which the railway company "*might use for other purposes than delivery of freight to or receipt of freight from the merchant or manufacturer,*" and in which the railway company might remove the track on termination of the agreement.

It was claimed that these contracts made no provision for payment of the switching charge complained of (though of course it is admitted the tariffs did). It was claimed it was the duty of the railway company to deliver interstate freight at their respective terminals without further or other charge beyond the freight rate applying at such points duly established and published according to law and that each of the defendants enforced and charged without division with connecting carriers a separate and distinct charge in addition to such freight rate and known as a "switching charge" for receipt and delivery of carload freight upon such industry tracks in the sum of $2.50 per car. The tariff provision of

the respective companies covering the $2.50 charge for switching to these private industries or warehouses on private sidetracks mentioned in set out. (Tr., 18.)

Reference is then made to "'team tracks' upon which free deliveries and receipts of interstate carload freight are made and taken by said defendants, and each of them, without any switching charge whatsoever." It was then claimed that in other cities, such as Portland, Seattle, Tacoma, Ogden, Salt Lake, El Paso, Denver, Omaha, Kansas City, St. Paul, Minneapolis, Chicago, St. Louis, Cleveland, Pittsburgh, and others, it is the usage of common carriers to receive and deliver carload freight upon adjoining industry tracks free of any switching or extra charge. It was claimed that in some cities in California to which the same rates are made as to Los Angeles there are located individuals, firms and corporations competitors of the Los Angeles merchants and manufacturers and that at such places such a charge was not imposed. It was, therefore, claimed that the switching charge complained of was excessive, unjust, unreasonable and unlawful as in violation of Section 1 of the Interstate Commerce Law, because it was contended as a matter of law that this service was included in the transportation rate to and from Los Angeles; also that the imposition of the switching charge, or of any charge for such service, was an unjust discrimination against the merchants and manufacturers of Los Angeles and an undue and unreasonable preference and advantage in favor of competitive individuals, firms and corporations in the other cities named in

the complaint and was, therefore, violative of Sections 2 and 3 of the Act.

Commission's Report.

After investigation the Commission held that the charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within carrier's switching limits was unlawful when such carload freight was moving incidentally to a system line haul; but the charge was not unlawful when the carload freight was moving incidentally to a foreign line haul, that is, where the car had been transported by one of the companies to Los Angeles and was set upon the other company's track and transferred by the latter to an industry located upon one of its spurs.

The majority report is by Mr. Commissioner Lane. If we disentangle the real pertinent facts from purely argumentative matter, characterizations and generalizations they will be found to be few and simple. He states complainant's contention was "that the charge when made incident to a system line haul is illegal inasmuch as the service for which the charge is made is an ordinary and necessary incident of carriage, that the compensation for that service is and must be included *as a matter of law* in the freight rate, and *that the segregation of this charge is not permitted by law.*" He then says (Tr., 43):

> "Each of the carriers here involved has designated certain territory as within its switching or yard limits in the City of Los Angeles, extending for six or seven miles in a general easterly and westerly direction, and including numerous tracks, main

lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over and above the freight rate named in the tariffs, while at industry spurs an additional charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood."

He then states that these spurs have been constructed under contracts with the respective railway companies, setting out a portion of the provisions of such contract. He states (Tr., 44):

> "The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations, both of these contentions are sound."

He then says (Tr., 45):

> "In connecting its main line directly with a spur, the carrier serves itself in various ways; it gains an extension of its own line for various terminal uses, makes a new highway for intercommunication between the carrier and the industry and likewise between each industry so

> connected and all others having a similar connection, and it attaches the industry to the carrier in such a way that the latter has a practical assurance of the industry's traffic both outbound and inbound. On the other hand, there can be no doubt but that the industry also benefits by such connection, in that it can receive by this spur track direct delivery of its freight without the expense and trouble of draying to and from *public team tracks*. Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a *special*, and generally in practice *an exclusive, railroad depot for the carload freight of a particular shipper.*"

(That it is a *railroad* depot, of course, is apparently a mere assumption. It is in no sense a *railroad depot* because the spur is only used for the receipt or delivery of carload freight of a private or particular shipper or person. A depot is for the general public.) He then indulges in generalities to the effect that there are hundreds of thousands of such tracks in the country; that they have knowledge (mainly outside of the evidence before them) that without such tracks "the carriers *of the country*" would be lacking in adequate terminal facilities. (All of which has nothing to do with the particular case or the legality under the Interstate Commerce Law of the charge in question.)

Generalizing again he says that the "carriers of the land" treat such industry spurs as a portion of their terminals making no extra charge for service thereto and that, to such generalization, defendants could name as exceptions but three cities, Los Angeles, San Francisco and San Diego. (Of course de-

fendants were not called upon to designate other cities or to go into the general question as to what might be done by other railroad companies in other parts of the country.) But it does appear from the Commission's own report that where such service is rendered gratuitously in other places it was and is forced by competition—"a tribute to competition."

He further states (Tr., 46):

> "*It appears that the same charge for such delivery has been made by all the carriers at Los Angeles as long as the railroads have had access to that city.* It was first imposed by the Southern Pacific, and as the other lines came in they adopted the policy of the line already there."

He then refers to other places in California to which what are known as coast terminal rates apply, that is, rates lower than to intermediate points and where a charge for spur track delivery is not made.

He then indulges in an argument as to what is supposed to be covered in the "American railroad rate." He argues that the regular tariff rate as a matter of American law covers the service of receipt and delivery of freight at any and every point or place in a city reached by tracks and where freight may be received or delivered, and states that an additional charge could not lawfully be imposed unless the consignee first ordered the car to be placed upon a team track and then had the same switched to his industry. (Tr., 48.) He states (Tr., 49):

> "Spur track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal."

(He of course here forgot that the carrier did not solicit the right to give this service except upon payment of the tariff charge and while the industry may have paid the cost of construction or rather, *only* a part thereof, the carrier was out the cost of the appliances and materials and of maintaining and operating the track.) He then again generalizes by assuming that all this relieves the carrier's team tracks necessitating a less outlay for expense of yards "in a crowded city." (We are not concerned as to what may be the effect elsewhere than in Los Angeles.) He seems then to make a point that delivery given on an industry spur is not supplemental to any other delivery. (He overlooks altogether the proposition that delivery on such spur is a *special* delivery to a *special shipper*.) But because such shipper does not ask for or demand first delivery at the team tracks he seems to think that therefore the railway company cannot charge for switching to and from the private warehouse of the shipper. He then makes the general and rather unwarranted statement (Tr., 49) that "after a most exhaustive inquiry *we cannot find*, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team track delivery." (He probably means, in a general way, that if the carriers were obliged to increase their team track facilities to accommodate all business it would probably involve a great investment and indirectly make team track delivery more expensive than it now is, which is mere speculation. But it is idle to say that if all persons were given

team track delivery the service of making delivery there would be as expensive as under the existing method, because there is now involved when a train arrives in the city a cutting up of the same and segregation of the cars, switching to the team tracks of those to be placed there, and also switching to each separate private industry or plant each car to be set there. If all cars were destined for the team tracks, but one or two switching movements at most would be necessary. It is by reason of the service to the separate industries that the expense is increased and there is thereby imposed upon the team track delivery a greater expense than would otherwise be the case. It must be self-evident that it is more expensive to switch a number of cars and make a separate delivery of each car at each industry, upon each particular spur track, involving a separate service at fifty or more different places, than if the entire business were concentrated at one place, such as the public team tracks. There is the economy resulting from concentration as against the waste and added expense resulting from separation or diffusion of the business.)

He then states:

> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays."

(Here he assumes, contrary to the very face of the tariffs, that the rate made by the carriers to or from Los Angeles was intended to cover the special service of switching and delivering to a private industry in the city.)

He then states:

> "A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done."

(In other words, he assumes that the special service of making special delivery of a carload of freight to a single shipper at his private plant under special contract is a like service as making delivery of carload freight in another place on the public team tracks for one of the general public who has not been favored with a special spur track.)

He then takes up the question whether a similar charge of $2.50, imposed in addition to the freight rate, made by one of the companies for transferring a loaded car which had been hauled into the city by one of the other companies and was then transferred by the receiving company over its own switches to a private industry, was reasonable and lawful, and finds that it was. (Tr., 51-55.)

On page 55 he states:

> "We do not find in the record sufficient data upon which to base a finding, as to the reasonableness of the amount of this charge of $2.50 for interline switching to industry tracks, and for the purposes of the present order will assume it to be reasonable."

In conclusion he simply finds the switching charge, which he had condemned, to be illegal and unjust as a matter of law. He does not find it was violative of either Section 2 or 3 of the Act. He does not find there was any unjust discrimination as between shippers in Los Angeles, receiving like service, nor does he find nor could he find under the facts or the evi-

dence that these favored industrial plants in Los Angeles were subjected to an *unreasonable disadvantage* by reason of any *undue preferences* given to other competing shippers, if any, in other localities. None such are pointed out in the report.

Mr. Commissioner Prouty concurred (Tr., 55) upon the assumption that "the shipper by furnishing the track pays all he ought to for the privilege."

Mr. Commissioner Harlan concurred largely upon ethical grounds in view of what he supposed was the general practice of carriers in other parts of the country to absorb such charges. Among other things he states (Tr., 58):

> "It is not necessary to inquire whether, as between a shipper using a team track at one of these points and a shipper using a spur track, the charge against the latter is discriminatory; it cannot be doubted that a shipper on a spur track would willingly pay even more than the charge now exacted in order to avoid the liability to damage involved in loading and unloading a car on a team track and to save the larger cost of such handling by wagon. Nor is it necessary to inquire just how far the commerce of the three communities may be adversely affected in their competition with other communities."

Mr. Chairman Knapp dissented in an able opinion directed entirely to a legal discussion of the questions which were apparently ignored in the ruling of the Commission. He ably argues that the power of the Commission in the way of investigation and decision is confined to determining whether some particular provision of the Interstate Commerce

Law is being violated or not, and that they cannot indulge in generalties. He then states (Tr., 60):

> "Plainly, as between team track consignees and spur track consignees at Los Angeles there is absolutely nothing upon which the latter can predicate a violation of the third section. It may be that the exaction of this charge at Los Angeles, when no similar charge is imposed at other Pacific Coast terminals, except San Francisco and San Diego, gives an unjust advantage to competing shippers at terminal points where spur track delivery is made without additional charge. This aspect of the case was incidentally presented but was not made the subject of particular investigation. * * * I apprehend, however, that a finding of undue prejudice to Los Angeles shippers for this reason would warrant no more than an order to cease and desist from the ascertained discrimination, which would leave to defendants the choice of discontinuing the charge at Los Angeles or imposing it at competing points found to be unduly favored. That Los Angeles shippers are at a disadvantage because of this charge in competition with interior or eastern shippers has certainly not been shown and could not be seriously contended."

Answering Commissioner Prouty's suggestion, he says (Tr., 63):

> "It is evident from what does appear that different spurs represent great differences in cost of construction, and it is equally apparent that there are great differences in the value of spur track delivery to different consignees, depending upon the number of cars received, the saving in cartage, and other circumstances. To say that the expense originally incurred by the shipper in securing spur track delivery under the standard contract, whether that expense was much or little, must

be regarded as compensation to the carrier for the indefinite future for performing the service of spur track delivery, however great or valuable that service may be, appears to me an indefensible proposition."

Nature of the order.

The order made by the Commission was absolute in its terms, requiring the defendant railway companies to desist from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and to abstain from exacting "*any charge whatever*" other than the charge for transportation from points of origin to destination for delivering or receiving carload freight to or from industries located upon such spurs. It did not require the defendants to remove any alleged discrimination complained of, which the carrier would be at liberty to do by imposing a similar charge upon other shippers or in other localities. The order proceeds upon the theory that "any charge whatever" for this service made in addition to the freight rate would be illegal *per se* although separately stated in the tariffs. No unlawful discrimination was found and the order does not proceed upon such a theory.

Some admitted facts and misconceptions.

The terminology, generalizations and characterization of certain facts and conditions no doubt tended to confuse the ideas of the learned Commissioner delivering the majority opinion as to the legal rights of the parties, but while such terminology may obscure the actual facts it cannot change them.

It is not very important whether the industrial spurs be characterized as "plant facilities" or "railroad terminals," nevertheless the Commission seems to have misapprehended the real contentions of the railway companies. So far as the spur track may be used in this special service of receiving and delivering freight at the private plant it is a facility constructed and used under the contract only for the benefit of such plant, though it may also be used incidentally by the railway company for some of its own purposes provided same does not interfere with the service to the plant. Any general designation cannot be regarded as decisive or determinative of the question here involved.

It is undisputed that each spur track was constructed under a special or particular agreement between the railway company and owner of the proposed industry; that it was by virtue of *such contract obligation only* that the railway company switched carload freight to and from such industries; that at the time such contract was made there was a provision in the railway company's tariffs fixing a charge of $2.50 per loaded car for such switching service and as this charge was inserted in the tariffs in compliance with the Interstate Commerce Law the railway company was legally obliged to exact the charge and the shipper to pay the same to as great an extent if not greater than if it had been specifically provided in the contract. Such shipper knew it was to his decided advantage to have this special service performed at the price stated including his incidental outlays rather than be obliged to accept or deliver

his freight upon the team tracks. If at any time he deemed the charge unreasonable or unduly burdensome for the service rendered he could direct delivery of or tender his freight upon the team tracks. The service of receiving and delivering carload freight at the plant of a single shipper with the necessary switching service connected therewith is in every sense a *special service* rendered under the contract and by virtue of the same. It is more valuable than and different from the service rendered to the public in general of delivery and receipt upon the public team tracks of the company.

It is also apparent that the Commission went outside of the record before it to obtain information as to some alleged practice or custom elsewhere in the country and even seems to have consulted its other records, but to what extent we are unable to surmise. Thus it is stated (Tr., 47):

> "This method of stating rates has never obtained in this country, at least so far as the records of this Commission show."

Had we any idea they intended to go upon such an excursion we might, had we deemed the matter at all pertinent from a legal standpoint, have inspected tariffs of other railways ourselves, and aided in the investigation.

ARGUMENT.

I.

THERE IS NO PRETENSE OF ANY ABUSE OF POWER BY THE COMMERCE COURT IN ISSUING THE INJUNCTION PENDENTE LITE.

A temporary injunction in this case was properly granted pending final hearing and trial in order to preserve the *status quo*, for if the railway companies were obliged in the meantime to comply with the order and eliminate the charge from their tariffs they would in the meantime lose this revenue and would never be able to recover the same under the law since their tariffs would then contain no such charge.

I High on Injunctions, 4th Ed., Sec. 5, 5a.
Allison v. *Carson*, 88 Fed., 581.
Spring Valley Water Co. v. *San Francisco*, 165 Fed., 657 and 666.

It can not be pretended that there was any abuse of power in the Commerce Court issuing the injunction *pendente lite* or overruling the motion to dismiss, and, to say the least, the case falls within the rulings of this court in *United States* v. *B. & O. R. R.*, 225 U. S., 306, in which it appeared that in that case, as in this, there was an application for a temporary injunction upon the bill of the railway companies and a motion of the United States to dismiss similar to the one at bar.

Notwithstanding the above would warrant af-

firmance of the order of the Commerce Court appealed from we are satisfied that under the undisputed pertinent facts the order of the Commission is founded upon a mistaken and erroneous conception and application of the Interstate Commerce Law.

II.

THE SWITCHING CHARGE IN QUESTION WAS NOT EMBRACED OR INCLUDED IN THE REGULAR RATE FOR TRANSPORTATION TO AND FROM LOS ANGELES. IT WAS IMPOSED TO COVER THE EXTRA OR SPECIAL SERVICE INVOLVED IN SWITCHING TO AND FROM EACH PRIVATE INDUSTRY UPON EACH SPUR TRACK WHEREBY PERSONAL DELIVERY TO A CONSIGNEE FAVORED WITH SUCH FACILITY WAS MADE. IT WAS DONE IN PUESUANCE OF CONTRACT BETWEEN THE PARTIES. AS THE RAILWAY COMPANY IS UNDER NO LEGAL DUTY TO MAKE SUCH A DELIVERY OR RECEIVE FREIGHT THERE THEN IF IT VOLUNTARILY CHOOSES TO DO SO IT MAY EXACT A SEPARATE AND ADDITIONAL CHARGE TO COVER SUCH SPECIAL SERVICE AS SUCH SERVICE IS ONE WHICH THE PUBLIC AT LARGE IN THAT CITY DO NOT DEMAND OR RECEIVE.

(a) *There was no dispute as to the meaning of the tariffs.*

At no time has there been any misconception or misunderstanding as to the meaning of the tariffs filed with the Commission. The Commission did not order the tariffs to be made more explicit. Upon their face, and as is apparent from the report of the Commission, the transportation rate for carrying any commodity to or from Los Angeles did not and

was not intended in fact to embrace or cover a service of making personal delivery to a consignee at his private plant or warehouse located upon some spur track in that city and which involved switching to or from such plant to the yard in which trains were made up or broken up. At no time was it ever understood while this charge was separately stated in the tariffs that the rate for transportation to and from Los Angeles in general would cover such delivery or receipt because the tariffs contained the provision that for such service an additional and separate charge would be imposed, which, it was claimed by complainants before the Commission, would be received and kept by the Los Angeles line and not divided like the freight rates with foreign lines.

It is obvious that so far as a proper construction of the tariffs were concerned the Railway Company never intended and shippers never understood that the ordinary rate on any commodity to or from Los Angeles covered compensation for making these special and, in a way, private or personal deliveries to certain favored shippers located upon spur tracks constructed under contracts giving them an interest in the same in connection with a qualified interest of the Railway Company.

That the switching charge covering this special service was not embraced in the ordinary freight rate covering transportation to and from the city is apparent from the fact that it is a flat charge of $2.50 for switching any loaded car regardless of the character of the freight therein or the actual

loading thereof, while the transportation rate to and from the city being based upon a fixed sum per hundredweight or per ton varying according to character of freight, the actual charge per car for such service would vary according to actual loading from minimum weight to capacity of the car and according to the character of freight loaded.

Of course the Commission well understood that to undertake to revise the tariffs by separately stating a freight rate to and from the team tracks to various points on the line, and other rates to cover the entire transportation to and from the various industries to points on the line, would not only make the confusion great, but would be impossible because of the fact that the switching charge was a flat sum imposed for that service alone regardless of the freight rate upon the commodity loaded. Moreover, separately switching a car is somewhat different from hauling the same car in a train over the road.

The Commission, however, did not order the tariff rates to be revised so as to include this special service. The service, properly speaking, was a switching service, treated as such by all parties and no complaint made upon that ground,—the sole complaint being that no charge at all should be imposed, largely because it was claimed that there was no separate charge made for delivery or receipt of carload freight on the team tracks.

After all a tariff is merely a sheet or document put out by the carrier, and now required by law to be made public and filed with the Commission, con-

taining the terms and charges which it offers to the public as the basis upon which it will contract to render the different services therein specified. Its meaning, or the extent to which any charge may carry, will be determined by the provisions of the tariffs read as an entirety and, in case of any ambiguity, as practically construed and applied.

(b) *The charge for this special service when imposed was properly and lawfully stated separately as in addition to the freight rate to and from the city, which, to say the least, covered service only rendered to the public in general.*

The order of the Commission, as shown by the majority opinion, is evidently based upon the assumption or decision that a freight rate to and from a given city as a matter of law must embrace within itself all compensation which might be earned for the receipt or delivery of freight at any point upon any of the carrier's tracks within its switching limits in such city wherever it may receive or deliver freight from or to *any* person, and that, therefore, a carrier may not lawfully segregate the rate from the switching charge or impose a separate charge for switching a single loaded car or two or more cars in connection with the receipt or delivery of freight at particular or special points within such switching limits, although such points or places are not the places where freight of the public in general in such city is received or delivered.

What reason can possibly exist for the establishment of any such rule?—a rule so rigid as to prevent a reasonable differentiation in rates and

charges based upon services rendered; a rule which would give to a few favored shippers located upon spurs, in a large sense *private, certainly private as to this particular service*, and receiving a service different from that rendered to the public in general, the same rate as that which is accorded to the public in general but who do not and cannot receive the special service in question because they have not been favored by the special facilities furnished under these special contracts.

What is there of magic in the statement of a freight rate or charge to or from a given city which would legally prevent the carrier from also stating and informing the public that those who desire a special delivery at their own warehouses located upon their spur tracks constructed and operated by the Railway Company by virtue of special contract shall be charged extra for such service? After all, how is it to be determined what the freight rates or charges to and from a given city do cover except from a construction as practically applied of the tariffs themselves, which, under the law, are required to be publicly filed and posted?

Outside of special agreement the duty of a railway company at common law and under the Interstate Commerce Act is only to the public in general and a single shipper can demand the performance of such duty only as he puts himself in the position or situation of one of the general public entitled to demand performance of the service in question.

A. T. & S. F. Ry. Co. v. *Tiedt*, 196 Fed., 348 (C. C. A. 7th Cir.).

It cannot be seriously doubted that outside of some contract obligations the Railway Company might lawfully insist upon receipt and delivery of all carload freight upon the team tracks and an owner of an industry located upon a spur without special agreement could not demand receipt or delivery of his carload freight elsewhere than upon such public team tracks. Receipt or delivery elsewhere would necessarily be a special service. No doubt he might be favored by the carrier by having delivery made at a more convenient point, but that would be a matter of favoritism which the carrier is not obliged to accord and could only accord in any event provided it did not result in undue prejudice to other shippers in the same locality. Because he does not want his delivery on the public team tracks is no justification for forcing or commanding the carrier to make without charge a special delivery for him at another place which the Commission is pleased to designate as "a *special* and generally in practice an *exclusive* railroad *depot* for the carload freight *of a particular shipper.*" Of course, it is obvious that the *plant* of the shipper is in no sense a *railroad* depot because the railway company has no control over the same and it is not a place where the company places for temporary storage freight received from or to be delivered to the public generally. But what justification is there for saying that, as a matter of law, a rate to or from the general depot of a railroad company in a given city necessarily includes also service for carrying to and from some other depot located in

another part of the city and upon other tracks of the company?

Would it not be lawful to make the tariff rates for transportation to and from a given city apply to freight received or delivered at a general depot of the company and then to provide that where the freight may be received or delivered at some outlying depot or depots within the same city a charge would be added to such rate? If such method is violative of any provision of the Interstate Commerce Law we respectfully ask, what provision? The jurisdiction of the Commission in investigating and making orders is confined in respect to "something done or omitted to be done" by a railway company "in contravention of some provision of" that Act.

Mr. Commissioner Knapp, in his opinion, said (Tr., 63):

> "I am convinced that an additional charge may lawfully be made for a private track or spur track delivery, because it is a special service which the carrier is not required to perform and a service of distinct value to the consignee, as compared with team track delivery, for which the carrier may rightfully exact compensation. The charge in this case is admittedly reasonable in amount and its imposition violates no law which the Commission is appointed to administer."

At common law and indeed so far as the Interstate Commerce Law is concerned, there is no insuperable objection, but on the contrary in the latter a plain provision under which the carrier may so separate its charges for distinct services so that each

shipper shall know what he is required to pay. It would certainly obviate a great deal of complaint of long standing favoritism if certain large shippers were required to pay for special services rendered to them which the public in general do not demand and of which they are in no position to take advantage.

(c) *The charge was separately stated in the tariff as required by Section 6 of the Interstate Commerce Law concerning terminal charges, etc.*

It is difficult to understand upon what provision of the Interstate Commerce Law the majority decision of the Commission was based. Reliance seems to be largely placed upon what was supposed by the Commission to be the American rule of stating rates and the Commission evidently decided that Section 6 of the Act neither required nor permitted a separate statement of this charge, but that under such section the service and compensation therefor was necessarily embraced in the rates or charges "between places" which the carrier was required to state under the first part of the section.

Ever since its enactment in February, 1887, the Interstate Commerce Law has not only authorized but in fact required a separate statement of all "terminal charges" when made, that is, of all charges imposed within or at a given terminal in addition to the rate of transportation to or from the place and which would in anywise affect the aggregate of the charges. (24 United States Statutes, 379.)

Section 6 of that Act required every common carrier to print and keep open to public inspection:

> "schedules showing the rates and fares and charges for the transportation * * * of passengers and property which any such common carrier has established and *which are in force at the time upon its railroad.* The schedules printed as aforesaid * * * shall plainly state *the places upon its railroad* between which property and passengers will be carried * * * and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

The purpose of that provision was palpable. It was to inform shippers generally of all charges which should be made for any and all services to be rendered, whether within or at the terminal, and the carrying charge to or from the place or locality, and for which service a charge might be made, so that they might be informed as to just what they could be required to pay.

The phrase "terminal charges" was well understood in the English Statutes and in the English decisions based thereon made prior to the adoption of the Interstate Commerce Act. As is well known, the latter Act adopted certain terms and provisions found in the English Statutes.

> *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S., 264, 284.

In speaking of "terminal charges" specified in the Railway & Canal Traffic Act of 1873 it is said by Boyle & Waghorn in their work, "The Law Relat-

ing to Railway and Canal Traffic," Volume 1, p. 112, as follows:

> "The various matters dealt with by it are all, to some extent, '*terminal charges.*' By Section 15, Railway and Canal Traffic Act, 1873, the Commissioners have power to hear and determine any questions or dispute which may arise with respect to the terminal charges of any railway company, when such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, *delivery*, and other services of a like nature."

In *Hall & Co.* v. *The London, Brighton & S. C. Ry. Co.*, L. R. 15 Q. B. D., 505, 533, 539, 540, decided in 1885, before the passage of the Interstate Commerce Law, a charge for shunting or switching cars within or at the terminal was spoken of as a "terminal charge."

The same view was taken in *Sowerby & Co.* v. *Great Northern Ry.*, 7 Railway and Canal Traffic Cases (B. & McN.), 156.

Section 15 of the Regulation of Railways Act of 1873, set forth in Volume 2, Boyle & Waghorn's "The Law Relating to Railway and Canal Traffic," p. 258, provided:

> "The Commissioners shall have power to hear and determine any question or dispute which may arise with respect to the *terminal charges* of any railway company, where such charges have not been fixed by any act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, *delivery*, and other services of a like nature."

"Terminal charges" are further mentioned and provided for in the Railway and Canal Traffic Act of 1888. Thus in Section 33 (Boyle & Waghorn, *supra*, Volume 2, p. 286), railway companies are required to render to shippers or those intending to ship an account in which the charge made or claimed by the company for the carriage of such merchandise shall be divided,

> "and the charge for conveyance over the railway shall be distinguished from the *terminal charges*, if any, and if any *terminal charge* or dock charge is included in such account, the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified."

In Section 55 of the same Act (2 Boyle & Waghorn, *supra*, p. 296), it is provided:

> "The term '*terminal charges*' includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes, and other similar matters, and of any services rendered thereat."

It was said by this court in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 284, with reference to another clause in the Interstate Commerce Act:

> "It may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute."

However that may be, it is pretty well settled that a switching service rendered within a terminal to make a special delivery of freight is appropriately regarded as a terminal service and one for which a separate, reasonable charge commensurate with the

value of the same may be imposed upon the party desiring and obtaining the benefit thereof.

National Tube Works Co. v. *Baltimore & Ohio R. Co.*, 8 Atl., 6.

4 Elliott on Railroads, Second Edition, Sec. 1566.

Owen v. *St. L. & S. F. R. R. Co.*, 83 Mo., 454; 25 American and English Railroad Cases, 371.

Sowerby & Co. v. *Great Northern Ry.*, 7 Railway and Canal Traffic Cases, 156.

Manchester, etc., Ry. v. *Pidcock & Co.*, 10 Railway and Canal Traffic Cases, 150.

MacNamara's Law of Carriers, pp. 226, 227.

D. G. H. & M. Ry. v. *Interstate Commerce Commission*, 74 Fed., 803; affirmed on appeal, 167 U. S., 633, 644-5.

In *Stone and Carten* v. *D. G. H. & M. R. Co.*, 3 Interstate Commerce Reports, 66, it was said shortly after the passage of the Interstate Commerce Law, by Commissioner Bragg:

> "*Terminal charges,* as such usually consist of *switching,* lighterage or trackage charges. Where these exist and are exceptional, as, for example, on shipments by rail from or to the harbor of New York, they are deducted in the shape of an arbitrary from the transportation rate, as part of the cost of transportation, before the balance of the transportation rate is divided among the carriers; and this imposes no additional charge upon the shipper or consignee. At Buffalo such terminal charges, on the other hand, enter into the division of the transportation rate among the carriers. Bridge tolls are in like manner often deducted as arbi-

traries from the transportation rate before the balance of the rate is divided among the carriers. *But at stations generally where terminal charges exist in the shape of switching or trackage charges these are made separable from and in addition to the transportation rate.* The watchful eye of the statute is seen, however, in requiring that all these terminal charges and methods, no matter how made, must be reasonable and just. The statute expressly requires that these, as well as the transportation rate, shall be separately stated in the schedules printed by the carrier and posted for public information, and in emphatic terms declares that neither must be made the means of any unjust discrimination or unlawful preference, or undue or unreasonable prejudice or disadvantage to any person, locality or traffic."

It seems, however, that Congress was not quite satisfied that the foregoing quoted provision of the Sixth Section was sufficiently definite to require a separate statement of all services and charges rendered in favor of any shipper or class of shippers in any given locality. That section was, therefore, amended by the Hepburn Law approved June 29, 1906, so as to provide as follows:

"That every common carrier * * * shall file with the Commission * * * and print and keep open to public inspection schedules showing *all the rates, fares and charges* for transportation between different *points* on its own route and between *points* on its own route and *points* on the route of any other carrier by railroad * * * when a through route and joint rate have been established. * * *

The schedules printed as aforesaid * * * shall plainly state the *places* between which property and passengers will be carried * * * and shall also state separately *all terminal*

> *charges*, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.* * * *
>
> * * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, *nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property except such as are specified in such tariffs.*"

Plainer or more emphatic language could hardly be used. "The rates * * * for transportation *between different points* on its own route," etc., plainly has reference to rates available to shippers generally and, even if it should be conceded, for the purposes of argument, that such rates for transportation between the points mentioned in the tariffs must, as a matter of law, include or embrace incidental service of receipt or delivery, it is obvious it could only have reference to incidental receipt or delivery of freight at the generally established depots or public team tracks, as the case may be, where the public in general are served. It must be obvious, therefore, that if the railway company by reason of special arrangement or contract specially undertakes

to receive or deliver freight for an individual shipper at another place, as at his private plant or warehouse, and does make a charge therefor, that that must be separately stated in the tariff in addition to the freight rate to or from such city. It is also obvious that where the railway company even in the absence of a special agreement undertakes to render such special service by making such special or private delivery to a particular shipper, or to particular shippers, that that must be separately treated and separately stated in the tariffs.

Mr. Commissioner Knapp in his dissenting opinion said (Tr., 61):

> "The rate established by a railway company for transportation from city to city, or from station to station, provides for no more as a matter of law than general delivery at freight house or team track. Undoubtedly the carrier may, if it chooses to do so, render this additional service without extra compensation. But it is one thing to say that a carrier may perform such a service without charge and quite another thing to say that it must do so."

It can hardly be contended that the imposition and separately stating of this charge was violative of Section 1 of the Interstate Commerce Law which provides that "all charges for *any service* rendered or to be rendered in the transportation of passengers and property * * * *or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

It is also to be noted that in the above quoted

clause, and after the words "in connection therewith" in the original Act, there followed: "or for receiving, delivering, storage or handling of such property." (24 United States Statutes, p. 379.) These words were subsequently omitted in the revision of 1906 because they were covered in other parts of such revision. (Beale & Wyman on Railroad Rate Regulation, Sec. 912.) Such language certainly contemplated that there might be a separate charge for receiving or delivering freight.

That provision is but declaratory of the common law rule adopted to prevent the exaction of extortionate or excessive charges by common carriers and others.

Interstate Commerce Commission v. *B. & O. R. Co.*, 43 Fed., 37, 42.

Interstate Commerce Commission v. *B. & O. R. Co.*, 145 U. S., 263.

The common law rule is well stated in *Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 396, 399.

As generally understood it has only reference to the amount of the charge. If a charge is found unreasonable the Commission fixes another as a reasonable maximum. But that was not done here. That section had no prohibition against the segregation of charges. On the contrary it is to be construed in connection with Section 6 and in itself, plainly recognizes that there may be a separate charge for each and every service rendered.

The Commission was unable to find in its report that the charge in and of itself was excessive. It fixed no other charge for the service. Neither did

it find that the charge taken in connection with the through rates, which would, of course, involve a consideration of rates upon a great number of articles, was in the aggregate excessive. Yet so far as we are able to gather from the report, the Commission seemed to think that in some way or other the imposition of such a separate charge was, as a matter of law, violative of the first or sixth section,—its solicitor now seems to rely on the first section. It certainly made no finding, as we shall show, that it was violative of either Section 2 or 3 of the Act.

The learned Commissioner relied upon Beale & Wyman, "Railroad Rate Regulation," Sec. 694. In Section 693 of that work, while those authors correctly state the distinction that the rate should include compensation for *facilities* used in performing the service, they add:

> "This ought to hold true of all *usual* services which the carrier *must* render the shipper in the line of its duty, but as to services outside its obligation to the shipper it may render a separate bill if it pleases. More than this, there are, it must be admitted, certain extraordinary services in special kinds of shipments which are not required by shippers generally, and for which, it seems, it is more convenient, if indeed not more just, to make a separate charge."

(d) *The Chicago live stock switching cases are in point.*

In *Walker et al.* v. *Keenan et al.*, 73 Fed., 755, reversing Judge Grosscup's opinion in the case of *Union Trust Co.* v. *The Atchison, T. & S. F. Rld. Co.*, 64 Fed., 992, it was held by the Circuit Court of Appeals, Seventh Circuit, that where a railroad com-

pany undertook to deliver live stock at the Union Stock Yards in Chicago, which involved the use of the tracks of the Chicago Junction Railway Company under license of the latter company, a separate charge for such service commensurate with the value thereof in addition to the rate to Chicago might be lawfully made and this, notwithstanding the contention that the railroad company concerned did not have stock yards of its own at the terminus of its own rails in that city. It appeared that for years prior to 1894 the railroad company made deliveries of live stock at the Union Stock Yards (using under license the tracks of the Chicago Junction Railway Company), at a tariff rate from various points to Chicago. At that time the Junction Company imposed a trackage charge of 40 cents per car for the use of its tracks and the Santa Fe Railroad Company, or its receivers, thereupon inserted a provision in its tariffs to the effect that where stock was delivered at the Union Stock Yards in Chicago an additional charge of $2 per car for such service would be made. It was contended that the railroad company had no sufficient stock yards of its own for delivery of live stock in that city and that, therefore, the rate carried as it had theretofore delivery at the Union Stock Yards. But the court stated that as complainants were demanding delivery at the Union Stock Yards it was not for them to say that the stock yards of the Railroad Company in Chicago were insufficient. They were sufficient for all purposes of delivery there made. The court also held it was lawful to make the added charge. In that case it will also be observed that the Union

Stock Yards adopted by the railroad company was a place of general delivery for shippers in general; that as long as it was using the tracks of the Junction Railway Company for making such delivery it was not important under the Interstate Commerce Law what the arrangement therefor might be. The real point in the case was that the railroad company was not obligated and could not be compelled to make delivery at the Union Stock Yards. If it voluntarily undertook to do so it might make a separate and additional charge for its voluntary undertaking. The same is true in the case at bar . The obligation of the Railway Company to make special deliveries at private industrial plants is an obligation arising solely out of contract and not by virtue of any general duty.

After the above decision the shippers then brought the controversy before the Interstate Commerce Commission making a number of railroads defendants and claiming that the charge for switching and delivery at the Union Stock Yards was excessive and unlawful. The Commission in a way followed the above case as to right to make a separate charge, but, finding that the different railway companies therein involved did not have adequate facilities of their own and that they adopted the Union Stock Yards as their live stock depot, understook to find that the rate prior to 1894 to Chicago did cover in fact delivery at the Union Stock Yards, and as the railway companies were only put to the added expense of trackage charge which, of course, varied

somewhat, held that $2 was unreasonable and fixed a charge of $1.

Cattle Raisers' Association v. *Ft. Worth & D. C. Ry. Co.*, 7 I. C. C. Rep., 513, 547, 548.

That order the courts declined to enforce.

After the passage of the Hepburn Law the case was reheard by the Commission and a similar ruling, decision and order was made.

Cattle Raisers' Association v. *C. B. & Q. R. R. Co.*, 11 I. C. C. Rep., 277, 290, 291.

The railroad companies thereupon filed a plenary suit in equity to set aside the order as invalid largely upon the ground that the Commission had not considered the reasonableness of the switching charge in and of itself for that service alone. The order was held invalid.

Stickney et al. v. *Interstate Commerce Commission*, 164 Fed., 638.

That case was affirmed by this court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S., 98.

So that this court held it was proper to separately state the switching charge and it was the duty of the Commission to consider and determine the reasonableness of that charge considered by itself and not in connection with the rate to Chicago.

Some point is made in the Government's brief, as was made in the opinion of Mr. Comissioner Lane, of a manifest slip in Mr. Justice Brewer's opinion in the case last cited, to the effect that the Chicago

Junction Railway or Stock Yards Company was affected by the order and would not receive reasonable compensation for the use of its property. The Chicago Junction Railway Company had been dismissed from the proceedings before the Commission and was not a party to the order. Neither was the Stock Yards Company. It was not performing the service in question. Its trackage charge was not affected and could not be affected by any ruling of the Commission.

The point in that case was not really that the service performed was *beyond* the terminal of the carrier and that, therefore, in such case it could only be properly segregated and separately stated, but rather that it was not the legal duty to deliver at the Union Stock Yards. "Terminal charges" are not necessarily confined to charges for services *beyond* the terminal but rather embrace service *at* and *within* the terminal.

Those cases also dispose of the point made by the Commission that the industrial shippers did not first demand or have delivery at the public team tracks and thereafter ask for the switching service. In the above cases the live stock shippers who were demanding and receiving delivery of stock at the Union Stock Yards did not ask for and first receive delivery at the stock yards of the Company in Chicago. Nevertheless, it was held that adding a switching charge, reasonable in itself, to the Chicago rate was legal in all respects.

(e) *Some other instances in which a separate charge has been imposed in addition to the usual rate.*

On many roads in the west, and probably in the east, it has at times been usual to charge 15 or 25 cents for a seat in a chair car or 50 cents for a seat in a parlor car in addition to the usual transportation rate per passenger which would only give him the right to a seat in the ordinary coach of the Company. It has never been conceived that because the passenger taking the chair or parlor car did not first occupy a seat in the ordinary coach that therefore it was unlawful to charge him the excess above mentioned.

So it is quite common at the present day to fix the charge for transportation of persons between Chicago and New York applicable to trains running on ordinary schedule time and to impose an additional charge of $10 or $20 per passenger applicable to practically the same kind of trains but running on limited time.

So also it has been frequent to impose an excess charge of 25 cents or so in addition to the regular passenger rate where the passenger did not procure a ticket before boarding the train. (*Sidman* v. *Richmond & Danville R. R. Co.*, 2 I. C. C. Rep., 766.) It has never been contended in such case that this excess or extra charge was illegal because the passenger by his failure to purchase a ticket relieved the railway company of the expense and obligation of printing and selling its tickets.

(f) *Not obligatory on the Railway Company to construct industrial spurs and deliver or receive freight thereon. Its obligation in that respect is wholly voluntary and contractual and it is therefore proper to impose a separate charge.*

It is well settled that railway companies are not under legal obligation to make personal delivery of freight to consignees. They are carriers by rail and generally make deliveries of freight only through their established depots or stations, or, in the case of carload consignments, upon their usual delivery or team tracks where delivery is made to shippers generally. Sidetracks running to private industries or warehouses of favored shippers have generally been constructed and are maintained and operated under some special contract or arrangement. The construction and maintenance of such sidetracks and the making of deliveries thereon to the private warehouses of certain shippers is a species of favoritism which the railway company is under no legal obligations to give. In the absence of some peculiar statutory provision a railway company was held under no legal obligations to construct or maintain a sidetrack to some private industry or to the private warehouse of some shipper mainly for the accommodation of the latter, and if it had constructed such sidetrack in the absence of some specific agreement it was under no obligations to continue the operation and maintenance thereof.

Jones v. *Newport News & M. V. Co.*, 65 Fed., 736 (C. C. A., 6th Cir.).

Mercantile Trust Co. v. *Col. S. & H. Rld.*, 90 Fed., 148.

Harp v. *Choctaw, O. & G. Rly.*, 118 Fed., 169, 178, 179.

Making delivery to a few favored shippers in a given locality at private warehouses located upon spur tracks is an extra or special service quite different from that which is given to the public in general. If such service has been in any case heretofore rendered free, then those shippers who have received the same have been unduly favored and have obtained an advantage over other shippers in the same city who might also be their competitors and who by reason of not being able to secure these spur track facilities are obliged to pay drayage or other charges to get their goods to their stores or warehouses.

In *Mann* v. *Pere Marquette R. Co.*, 135 Mich., 210, 219, it was held that a railway company in operating a sidetrack constructed under a similar form of contract to that found in these cases was not a common carrier.

In *Gulf Compress* v. *A. G. S. Ry. Co.*, 100 Miss., 582, 56 Southern, 666, it was held that a railway company was under no duty to deliver on private spur tracks.

It follows that if a railway company cannot be compelled to construct and operate a spur track to a private industry or to receive or deliver freight at the doors of such private industry, should it voluntarily undertake to do so, that is a matter of private arrangement. For that which it voluntarily does but is under no legal obligations to do it may at least make a distinct, separate and additional charge therefor commensurate with the value of the service rendered. The important question is, as stated, may the railway company make a separate charge for a

special service in addition to the usual rate found in its schedules for carriage of a carload in a freight train to and from a given city and which usual rate under the tariffs does not in fact cover or include the service of delivery at a private warehouse upon a spur track.

The only provision in the Interstate Commerce Law concerning switch connections is that found in Section 1 of the Hepburn Act, approved June 29, 1906 (34 U. S. Statutes, 584), amending the Interstate Commerce Law. It requires a common carrier to "construct, maintain and operate *upon reasonable terms* a switch *connection* with any * * * *private sidetrack which may be constructed to connect with its railroad,*" where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance thereof; and to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If it shall fail to install and operate such switch or connection, then on application of the shipper before the Commisison, it shall investigate and determine the safety and practicability and justification and reasonable compensation therefor, and the Commission may make an order as provided in Section 15, etc.

Such provision was not referred to or relied upon and, of course, was inapplicable as it only refers to a "*connection*" to be made with a private sidetrack. It does not require a railway to receive or deliver cars at the doors of the private industry or extend its track thereto. The provision may be invalid as it

requires expenditure by the railway company for a private not a public purpose:

Missouri Pacific Ry. Co. v. *Nebraska,* 217 U. S., 196.

Northern Pacific Rld. Co. v. *Railroad Commission,* 58 Wash., 360; 108 Pac., 938.

Brown v. *Gerald* (100 Me., 351), 61 Atl., 785.

Mays v. *Seaboard Air Line* (75 S. C., 455), 56 S. E., 30.

Of such sidetrack connections required to be constructed under a Nebraska statute it was said in *Missouri Pacific Ry. Co.* v. *Nebraska, supra,* page 206:

> "Moreover, a part of the company's roadbed is appropriated *mainly to a special use,* even if it be supposed that the sidetrack would be available incidentally for other things than to run cars to and from the elevator."

On page 207 it is further stated:

> "But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, *are private connections?*"

The above quoted provision, however, whether valid or invalid, and it is not necessary now to decide, plainly indicates the view that Congress did not understand that any provision of that act required that such switch connections should be operated without reasonable compensation. Such compensation would, of course, be fixed in addition to the regular or usual freight rate.

The case last above cited (*Mo. Pac. Rly.* v. *Nebraska*) is also pertinent to the effect that so far as serving the private industry may be concerned the

industrial spur constructed under contract was intended for a private purpose or use and the service to the industry is a private or special service.

It may be also considered as reasonably well settled that a railway company would not have power or authority to appropriate or condemn a right of way in order to construct a spur track to be operated for the special accommodation of one or a few shippers, as such use would be for a private and not a public purpose.

Pittsburgh, W. & K. R. R. Co. v. *Benwood Iron Works*, 31 W. Va., 710; 8 S. E., 453.

In re Split Rock Cable Road Co., 128 N. Y., 408; 28 N. E., 506.

Chattanooga Terminal Ry. Co. v. *Felton*, 69 Fed., 273, 279, 280.

C. & E. I. R. R. Co. v. *Wiltse*, 116 Ill., 419.

Brown v. *Gerald*, 100 Maine, 351; 61 Atl., 785.

It follows, therefore, that so far as the service here involved pertains to each industrial spur only for the accommodation or service of the private industry located thereon, such use and such service is special and, in a way, private and personal; and it is difficult, therefore, to understand how a charge for such service should, as a matter of law, be included in any freight rate which was intended to be generally applicable to shippers and consignees in common.

(g) *The Covington Stock Yards Case.*

The decision of this court in the *Covington Stock Yards Case*, 139 U. S., 128, seems to have been pro-

lific of much misconception as to what was there decided in respect to the carrying distance of a freight rate. It arose in 1886, prior to the passage of the Interstate Commerce Law, and no provision of that law was anywhere referred to in the opinion. So far, however, as the real point involved may be concerned the ultimate decision perhaps would not have been different.

It there appeared that the Kentucky Central Railroad was being operated by a receiver. It had no stock yards of its own in Covington but had made an exclusive contract with the Covington Stock Yards Company in which it agreed to make the yards of that company its "depot for delivery of all live stock" during the term of the contract, and not to build, "nor allow to be built," on its right of way, any other depot or yards for the reception of live stock. It was further provided that the Stock Yards Company might charge 60 cents per car upon all stock loaded or unloaded in the yards *"for passing such stock through the yards of said company to and from the cars of said railroad company."* In other words, the stock yards company was made an agency of the railroad company. Keith, a shipper and receiver of cattle, owned stock yards adjoining the railroad tracks and opposite those of the Covington Stock Yards Company. He declined to pay the charge exacted by the stock yards company and demanded delivery of his stock through his own yards or through the Covington Stock Yards free of the *"yardage" charge.* In June, 1886, he filed an intervening petition in the receivership case. The receiver vouched

in the Covington Stock Yards Company which was permitted to defend and which set up the contract in question. The court decreed it was the duty of the railroad company as a carrier of live stock to provide suitable *means and facilities* for receiving on board its cars live stock offered for shipment; that the contract between the railroad company and the Covington Stock Yards Company did not entitle the latter to impose upon any shipper of live stock over said road "*passing through the yards of said company to and from the cars of said railroad company,*" any charge whatever for such passage; that the Railroad Company not having provided a suitable depot except the yards of the stock yards company, it was decreed that the receiver receive and deliver from and to Keith *through the Covington Stock Yards,* all live stock shipped or offered for shipment upon consent of said Stock Yards Company, in writing, "*free of any charge for passage through said yards to and from the cars of said railroad company.*" *In default of such consent being filed* it was decreed that the stock should be received or delivered to Keith at his own platform. In the opinion it is said (page 133):

> "The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, *to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment* over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But, it is contended, that the de-

cree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, free from any charge other than the customary one for transportation, *for merely passing into and through the yards of the Covington Stock Yards Company to and from the cars of the railroad company.* As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, without danger or inconvenience to the public it the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, *that the carrier may, without a special contract for that purpose, require the shipper or consignee in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.*"

On page 136, the court continued:

"We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the City of Covington where persons engaged in buying, selling or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live

stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellee had been permitted to use them, without extra charge for mere '*yardage*,' they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish."

In this connection may be read with profit the able opinion of Mr. Justice Day in the Circuit Court of Appeals, Sixth Circuit, in the case of *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 118 Fed., 113, wherein it was held that while it was the duty of the carrier of live stock to provide reasonable facilities for unloading and care of such stock; that where it had done so, either by building stock yards of its own or by contract with a stock yards company, its refusal to deliver stock to other stock yards in the same city was not an unlawful dis-

crimination or violative of its legal obligations. That decision was affirmed in 192 U. S., 568. On page 572 Mr. Justice Holmes stated:

> "The court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its track, its obligation is no greater because of the intervention of a short piece of the track of another railroad."

There is quite a difference between imposing an additional charge for the use of stock yards in receiving or delivering cattle and the charge imposed in this case of performing a special switching service and making special receipt or delivery of freight. There is quite a difference between charging for the performance of such service and a case wherein such charge is imposed and there is attempted to be also imposed another charge for using facilities necessary for the performance of the service. That was the distinction made in the Covington Stock Yards case.

(h) *Government's cases not in point.*

Cases cited in the Government's brief from the Supreme Court of Illinois are clearly not in point. *Chicago & N. W. Ry. Co.* v. *The People*, 56 Ill., 365, was a mandamus proceeding on relation of the owners of an elevator of grain in Chicago to compel the railway company to deliver to such elevator grain in bulk which might be consigned to it on the line of its road. The railroad company refused to deliver

grain to any other elevator in Chicago except that of Munn & Scott, although grain was accepted by the railroad company consigned to other elevators as well situated upon the tracks of the company. The decision in that case was based upon two earlier cases, one being that of *People ex rel.* v. *C. & A. R. R. Co.*, 55 Ill., 95, a like proceeding in mandamus for a like purpose, and the case of *Vincent et al.* v. *C. & A. R. R. Co.*, 49 Ill., 33. The decision in the last case was the basis of the decision in the two former cases. There a bill for injunction was filed to compel the railway company to deliver grain to plaintiff's warehouse in Chicago located upon its tracks therein where such grain was received by the railway company and consigned to the plaintiff's elevator. It seems the railway company had been delivering all such grain to the elevator of Munn & Scott and refused to deliver same to the elevator to which it was consigned without an extra extortionate charge, though the one elevator was as favorably located upon the railway tracks as the other. On page 40 of the opinion in that case it will be seen that a *statute of Illinois* made it unlawful for any railway company to deliver any grain to any warehouse other than into the one to which it was consigned without the consent of the consignor or consignee thereof, and making the railway company liable in damages not only to the owner but to the warehouseman.

It will thus be seen that these cases depended upon a specific statutory duty and also upon the fact that the grain was received by the railway consigned to the particular elevator. These cases are

well commented upon by Judge Taft in the case of *Jones* v. *Newport News*, 65 Fed., 736, wherein, after referring to those and other Illinois cases he stated:

> "They depended on *statutory obligations*, and were not based upon the common law, though there are some remarks in the nature of *obiter dicta* which gives color to plaintiff's contention."

The case of *Coe* v. *L. & N. R. Co.*, 3 Fed., 775, contains an offhand opinion of Judge Baxter on an application for a temporary injunction to compel continuance of deliveries of live stock at Coe's stock yards. He was considerably influenced by the fact that plaintiff had invested a large sum in fitting up stock yards where for a number of years he had received live stock as consignee. The court held that a contract afterwards made between the railway company and the Union Stock Yards Company making the yards of the latter company the exclusive live stock depot of the railway company was invalid and directed the railway company to continue, pending litigation, deliveries of live stock at plaintiff's yards where the same were consigned to plaintiff. No authorities are cited in the opinion except the case of *Vincent* v. *C. & A. R. R. Co.*, 49 Ill., 33.

While in the Coe case no question was raised of the right to extra compensation for making delivery at Coe's stock yards, and the case would not be applicable, yet it is obvious that Judge Baxter's views are contrary to those expressed in *Central Stock Yards* v. *L. & N. R. R. Co.*, 118 Fed., 113, wherein the court passed upon the applicability of the provision against discrimination in the Kentucky Constitution as well as provisions of the Interstate Commerce

Law, and wherein the case was likened to one in which stock yards might be located upon the same railroad at the same place, and in which it was shown that in such cases there was no obligation to deliver to one stock yards because the railway company might deliver to another at another place under an exclusive contract with some stock yards company. As stated before, these views were confirmed by this court in 192 U. S., 572.

(i) *As to relative cost of this service.*

It seems to be contended that it costs no more to make the respective industrial deliveries than it does to make team track delivery and that, therefore, no separate or additional charge should be made. It is based upon the statement of the Commisssion that "after a most exhaustive inquiry *we cannot find* taking this service as a whole in the same way as it is treated by the carriers that the service is more expensive to the carrier than if all cars were given team track delivery." That is rather a broad and general statement and the Commission evidently included in their consideration the problematical expense of increasing the team tracks which might perhaps be necessary if all deliveries were made there. But, as stated by the Commerce Court, the contention is against the physical facts. It certainly costs more to switch a car to a private industry from one to seven miles than to switch one car with a number of others a few hundred feet to the team tracks. Then the separate maintenance and operation of separate industrial spurs makes the expense

upon the carrier greater than if all the tracks and all the work were concentrated at one place.

As stated heretofore if all deliveries were made on the team tracks the entire string of cars could be switched by one or two movements to that point, whereas now cars must be segregated and those intended for the team track switched there while each car intended for each separate industry must receive separate and particular attention and separate service.

The charge for this separate service is exceedingly low and evidently made in contemplation that these industries did not have cars first switched to the team tracks. That would have been altogether a useless and unnecessary operation.

It would evidently be cheaper in the first instance for the Railway Company to locate and construct its delivery tracks at one place than to pay for even a part of the construction of a great number of spur tracks and switches running to different special industries and to thereafter maintain and operate each one. It would also be much cheaper and easier in all respects for the Railway Company to make all of its deliveries upon the team tracks at one place than to make a part of its deliveries there and the rest to various industries situated in different localities and upon various numbers of other tracks.

But the cost of performing a particular service among a number of others, if indeed the same could be approximated, is not the only element which is to be considering in determining the reasonableness

of a charge. The Railway Company is entitled to something more than cost.

Southern Railway Co. v. *St. Louis Hay & Grain Co.*, 214 U. S., 297.

Interstate Commerce Commission v. *Stickney*, 215 U. S., 98.

The value of the service is an important and necessary element for consideration, and if we were to assume, for the sake of argument, that it costs no more to deliver a car at some particular industry than to deliver a car upon the public team tracks, yet it is admittedly of more value to the shipper to have the car delivered at his industry than upon the public team tracks. It is the value of the service which, after all, is to be ascertained.

Railroad Rate Regulation, by Beale & Wyman, Sec. 320.

Canada Southern Railway Co. v. *International Bridge Co.*, L. R. 8 App. Cas., 731, 732.

Kennebeck Water Dist. v. *Waterville*, 97 Me., 185; 54 Atl., 6.

It would be error in the Commission to ignore that element.

It may not cost more to transport a ton of pig iron or coal over a given line than to transport a ton of bar copper, but it is worth more to transport the latter because the service is worth more. As stated by Mr. Commissioner Knapp (Tr., 62):

> "If a carrier may make different rates on different articles because of differences in value,

> although carried at the same cost, why may not a carrier make differences in rates on the same article, although carried at the same cost, because of differences in place and manner of delivery which makes one kind of delivery much more desirable and valuable than the other? Are not the convenience and conceded saving cheaply purchased? Does not the spur track consignee in fact have an advantage over his team track competitor, a direct pecuniary advantage, much greater than $2.50 a car?"

Spur tracks were not constructed, or the undertaking of the Railway Company to make deliveries or take receipt of freight thereon made, with the view that the same could be done as cheaply as if made upon the public team tracks. On the contrary, from what incidentally is stated in the Commission's report, as well as by reason of the express provision of the contract, the main purpose of the Railway Company was to secure the traffic of the industry, the contract requiring routing of the same over the railroad in question; and that traffic was secured by tieing the shipper and his plant under the contract to the railroad.

The Commission, however, merely stated it was unable to find that it cost more to perform service at the spur tracks than if all cars were given team track delivery. That was merely negative and not equivalent to a finding that it was more expensive. The railways were not required to prove such fact to justify the imposition of the additional charge. Even if team track delivery were made without extra charge that would not justify holding invalid a charge for this special service unless it were con-

tended and found that it resulted in an undue preference of team track shippers and to the unreasonable disadvantage of spur track shippers. That is not even pretended.

It is difficult to understand why there should be such a straining at construction to give to these specially favored shippers all the benefits derived under their contracts and permit them at the same time to repudiate the condition, that is, the tariff charge, in view of which these contracts were made and in view of which the Railway Company agreed to render this service. It was stated by Mr. Commissioner Knapp:

> "I cannot escape the impression that their present effort to retain the benefits of spur track connection and delivery, and yet deprive the defendants of one of the material considerations for making these agreements, is not altogether free from criticism."

III.

THE IMPOSITION OF THIS CHARGE IS NOT SHOWN TO BE VIOLATIVE OF THE SECOND SECTION OF THE INTERSTATE COMMERCE LAW CONCERNING UNJUST DISCRIMINATIONS.

It is contended in the Commission's brief that the imposition of this charge for industrial switching and receipt and delivery of freight while none is made for delivery or receipt upon the team tracks in Los Angeles is violative of the second section of the act. That section provides:

> "That if any common carrier * * * shall,

directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, * * * than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination."

It refers only to discrimination between shippers and not between localities.

It was not contended in the complaint before the Commission that the industrial shippers were unjustly discriminated against by reason of any favoritism to the team track shippers in Los Angeles, because it was recognized that the former had a very decided advantage over the latter.

The foregoing provision is sufficiently definite in itself to be capable of judicial enforcement by the courts without preliminary action by the Commission.

Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S., 184.

In every case, therefore, the court may itself determine, as it has frequently done, whether as a matter of law, under the facts shown, there is a violation of the second section or not. Would it not be strange if that section could be so construed as to demand a species of favoritism which might likely be condemned under the third section, namely, by

forcing the carriers to forego this charge against industrial track shippers, thereby to give to such shippers an undue advantage, on the whole, over the team track shippers in that city? But the Commission itself did not state as a conclusion that the imposition of this rate was an unjust discrimination against the industrial plants and in favor of team track shippers or in violation of the second section of the act. It is true the Commission did state "A carrier may not so construct its rates as to compel an extra charge for like service and this, in our judgment, the defendants at Los Angeles have done." But that could refer only to the sixth section. The only pretended likeness in the service, however, was receipt or delivery in carload lots.

The statute speaks of "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." There must be service in transportation which is identical with or alike to the other compared and it must also be under substantially similar circumstances and *conditions* as the other, and it must be of a "*like kind of traffic.*" The Commission did not even find that the traffic at the respective places on the industrial as compared with that on the team tracks was of a like kind or that there was necessarily competition between the respective parties. But in any event the switching for the short distance to the team tracks for delivery thereon was not at all similar to switching to each of the various industries located some as far as seven miles away for delivery or receipt thereat.

The action of the carrier is not subject to *wholesale* condemnation. The switching is over different tracks altogether, and to different places. It is not rendered *under similar circumstances and conditions.*

Spur track service to each special shipper under special contract involves upkeep and separate operation of such spur track by the Railway Company, which track must be used primarily and preferentially for the business of such shipper and may be used only incidentally for railway purposes where the latter use will not interfere with the preferential use to be made in serving the particular industry. That alone differentiates such service from that rendered to the public at large on team tracks used for all indifferently.

The same may be said also with respect to the deliveries or receipt of freight. In the one case there is a special delivery to a single shipper by virtue of a special agreement or understanding. In the other case a general delivery to one of the public at large by virtue of a legal duty of the Railway Company.

The charge in question was imposed upon all shippers in like station in Los Angeles receiving the same special service. While the Railway Company might perhaps have graduated its charge to the different industries, it put them all on a parity and there is no pretense of any discrimination as between them. The discrimination condemned by the second section is one in favor of a particular shipper and against other shippers in a *like situation* which destroys that equality of treatment in

rates which it is the great purpose of the law to enforce.

American Sugar Refining Co. v. *D., L. & W. R. R. Co.*, 207 Fed., 733.

Speaking of this section in an early case the late Mr. Justice Jackson said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 43 Fed., 47:

> "When the traffic is not of like kind, or when the service is not 'alike and contemporaneous,' or when the transportation is not rendered 'under substantially the same circumstances and conditions,' differences in charges do not constitute 'unjust discrimination.'"

On page 49 he stated:

> "To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. In respect to passenger traffic, the position of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist *substantial identity of situation and of service*, accompanied by irregularity and partiality, resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination."

But it is sufficient to say that at any time any of these industrial shippers may demand that his carload freight be received or delivered upon the team tracks at the same rate and on the same conditions as shippers in general, and upon what, therefore, may any unjust discrimination against him be predi-

cated? When he puts himself in a like situation demanding the same service that the public generally receive all are treated alike. It is only when he is demanding an extra or special service rendered by virtue of some special agreement and which a general shipper cannot demand or receive; that he is in an entirely different situation from the rest of the public and any claim of unjust discrimination is a mere sham.

It could not be pretended that an absolute refusal on the part of the railway company to construct these spur tracks, or to make deliveries at the private plants located thereon, constituted any unjust discrimination as against any such shippers and in favor of shippers using the public team tracks.

Central Stock Yards Co. v. *L. & N. Rld. Co.*, 118 Fed., 113, 117, 118.

How then can it be contended that when the railway company does undertake to make such a special delivery at a private plant that the imposition of a reasonable charge therefor results in an unjust discrimination against such shipper and in favor of those served only by the public team tracks? Is it not by virtue of his contract with the railway company that the spur track shipper gets a better and more desirable service than that received by one of the public at large at the public team tracks?

In *Penn Refining Co.* v. *Western New York & P. R. R. Co.*, 208 U. S., 208, an order of the Commission that carriers not charging for tanks on tank oil shipments desist from charging for the barrel

on barrel shipments or else furnish tank cars to all shippers applying therefor, was held to be equivalent to a holding that the charge for the barrel was not in itself excessive, and it was, therefore, also held that barrel oil shippers who had not demanded tank cars had not been discriminated against and were not entitled to reparation for the amounts paid by them on the barrels.

The English decisions are summed by Mr. Justice Brown in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 283, 284, as follows:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

It is sometimes stated that the above section two is modeled somewhat after Section 90 of the Railway Clauses Act of 1845 of England, which required equality of rates for carriage of goods "passing only over the same portion of the railway" under the same circumstances. That section is quoted at large in *Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, L. R. 11 Appeal Cases, 110. A comparison may be readily made. But in that case it was held (p. 111):

> "In order to bring the case within the language of the section, the termini both of *arrival* and *departure* must be the same."

It was intended to prevent favoritism where the services rendered respective shippers were identical and while allowing a varying of the tolls authorized

by the special act to be taken either upon the whole or upon any particular portions of the railway, provided, "that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing *only* over the same portion of the line of railway under the same circumstances." See also:

Manchester, Sheffield & Lincolnshire Ry. Co. v. *Denaby Main Colliery Co.*, L. R. 14 Q. B. Div., 223.

On page 224 in that case, Lord Lindley said:

"The expression, 'under the like circumstances, has been the subject of decision, and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods."

Finnie v. *Glasgow Ry. Co.*, 2 McQ., 183.

Murray v. *Glasgow & Southwestern Ry. Co.*, 11 Court Sess. Cas., 4th Series, p. 205.

But it is contended that the court is precluded from inquiry or determination whether the Commission has correctly decided or determined the question of unjust discrimination under Section 2 and *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.*, 220 U. S., 235, is cited. We are, however, unable to find in the Commission's majority report any conclusion or finding of unjust discrimination as between shippers in Los Angeles. In the above case, however, this court did undertake to de-

termine the question of law whether there was an unjust discrimination under Section 2 and whether that section was properly applied. Speaking of the varied views of the Commission this court said on page 251:

> "On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition, that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured."

We do not understand that the court is precluded from inquiring whether the Commission has erred in the application of the law or miscontrued the same and that it has no power to correct such error by holding the Commission's decision and order to be invalid. (See *U. S. et al.* v. *B. & O. Rld. et al.*, decided Dec. 1, 1913.) On the contrary this court has held that whether under a given state of facts there is a violation of either the second or third section is a question of law upon which the conclusion of the Commission is not final. *Interstate Commerce Com.* v. *B. & O.*, 225 U. S., 326. We do not understand that in our bill we have gone farther than was sanctioned by this court in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S., 42, or in *Interstate Commerce Commission* v. *Stickney*, 215 U. S., 98. We do not understand that either of these cases have been questioned or criticised. Further than that, we allege that certain facts stated in the

bill were established by the undisputed evidence before the Commission. In the learned opinion of Mr. Justice Lamar in *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S., 88, it was stated:

> "In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware, etc., Ry.*, 220 U. S., 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'"

Notwithstanding this we feel that if the real facts pertinent to this particular case, even as suggested in the Commission's report, be segregated from the rather confusing terminology and generalizations, it is apparent the Commission has founded its decision upon a misconception of the requirements of the statute, and that its order founded thereon is plainly invalid.

IV.

THE CHARGE IS NOT FOUND TO BE VIOLATIVE OF THE THIRD SECTION OF THE INTERSTATE COMMERCE LAW CONCERNING UNDUE PREFERENCES.

It is not contended in the Commission's brief that the imposition of this switching charge at Los Angeles is found to violate the third section in any respect. In the Government's brief, while it is not contended that this section is violated as between shippers in Los Angeles, it is claimed but without in-

sistance to be violated as between industrial spur track shippers in Los Angeles compared with similar shippers in some other localities, though the localities are not pointed out or specified. It might be sufficient here to say that as the Commission has not found that the imposition of the charge upon the industrial spur shippers in Los Angeles and not imposing the same upon spur track industries located at other places upon lines of the respective railways gives such other shippers or localities *undue* or *unreasonable* preference or advantage whereby these Los Angeles shippers, or Los Angeles itself, is subjected to an *undue* or *unreasonable* prejudice or disadvantage, the Government's contention is without foundation. Nevertheless, to avoid misconception it may be proper to briefly suggest the following:

Any charge of violation of the undue preference clause must be confined to a consideration of places and shippers served by the particular railroad complained of and it is immaterial what its connections or other railroads may do or fail to do in other places.

Eau Claire Board of Trade v. *C., M. & St. P. Ry. Co.*, 4 I. C. C. Rep., 65, 78.

That proposition would seem to be self-evident.

Again, it would be necessary for the Commission to determine and point out in what other localities industrial spur track shippers upon the line in question were in competition with those in Los Angeles. For if there was no competition between them there could be no complaint that one received an undue

advantage to the unreasonable disadvantage of the other. As was well stated by Mr. Justice Jackson in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 43 Fed., 47:

> "These words necessarily involve the idea or element of comparison of one service or traffic with another *similarly situated and circumstanced*, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to *competing parties*, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions."

See this case, also, on appeal:

> *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S., 263 (282).

See also *United States* v. *C. & N. W. Ry. Co.*, 127 Fed., 785, wherein it was held that the government, in the transportation of its troops, could not complain because it was not given the party rates which the tariffs of the railway company provided as open to theatrical troupes and others giving certain kinds of entertainments. In the opinion it is said, with reference to the Government:

> "It is not engaged in the same business as any of those classes that are given special rates, is not in *competition* with them, and is not therefore injured or discriminated against."

To the same effect see:

> *Hozier* v. *Caledonian Ry. Co.*, 1 Nev. & MacN. (Railway & Canal Traffic Cases), 27.

Nicholson v. *Great Western Ry. Co.*, 1 Nev. & MacN. (Railway & Canal Traffic Cases), 150.

Lees and others v. *The Lancashire & Yorkshire Ry. Co.*, 1 Nev. & MacN. (Railway & Canal Traffic Cases), 352.

In *Lincolnshire Patent Fuel Co., Ltd.*, v. *London and Northwestern Ry. Co. et al.*, 12 Railway & Canal Traffic Cases, 77, a railway company carried shipments of coal to certain sidings of a ship canal at a lower rate than they carried coal to a trader at the same sidings; such coal (which was in the form of slack) being then manufactured by the trader into patent fuel for shipment. Upon complaint by the trader that the railway company was unduly preferring the shipment of coal to his prejudice it was held that no competition existed between the coal carried for shipment and that carried for the trader; and that therefore the applicants had no *locus standi*. Also the fact that the trader manufactured the coal carried for him by the railway company into an article which might ultimately compete with the coal carried by the railway company for shipment was not bound to be taken into consideration by the railway company in regulating their charges.

See, also, Boyle and Waghorn on "The Law Relating to Railway and Canal Traffic," Volume 1, p. 159. On page 158 these authors sum up the English cases construing the undue preference clause, as follows:

"The words 'preference' and 'advantage' of

themselves give rise to questions of considerable importance.

Applicants occasionally desire to construe these words as the equivalent of 'benefit,' and to claim that whatever conveniences or concessions are granted to one trader or class of traffic are due to be granted to all others.

The courts do not accept this view; there is no question of preference when different matters are under consideration, and *one person is not placed at an advantage over another if their traffic has nothing in common.*

Expressing the point in another form, the courts read both limbs of the preference section together, and hold *that the preference of the first part must be accompanied with the prejudice of the other,* and that *the 'disadvantage' of the one must be connected with the 'advantage' of the other,* before the provisions of the section come into operation."

In *Phipps et al.* v. *London & Northwestern Ry. Co.,* 8 Nev. & MacN., L. R., Q. B. Div. (1892, Vol. 2), p. 229, Lord Herschell, referring to the undue preference clause, said on page 236:

"The question, therefore, which the tribunal, whether it be the court or the commissioners, before whom such a question comes, has to determine is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other.

I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference."

Again, whether the alleged preference is undue or not depends largely upon whether at the one place or locality the railway company is forced by competition of markets or of other carriers to forego mak-

ing a charge, which it is not compelled to forego at the other point. That is an important element to be considered and to be given due effect by the Commission in any determination.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S., 42, 48.

Interstate Commerce Commission v. *C. G. W. Ry. Co.*, 209 U. S., 108, 119, and authorities cited therein.

Had the Commission found any *undue* preference, etc., it would have been incumbent upon it to point out the localities or shippers unduly favored so as to permit the carrier to obviate the preference in its own way. It could not make an arbitrary order requiring the carrier to forego imposing any charge altogether, or under any conditions. In such case the order would have to be made in the alternative so that the carrier would be at liberty to remove the complaint as to any unlawful preference by either foregoing the charge itself at Los Angeles or imposing a similar charge in the other localities found to be unduly preferred. As stated by Mr. Commissioner Knapp in his report:

> "This aspect of the case was incidentally presented but was not made the subject of particular investigation. If it is really desired to base a claim for relief upon this ground the complainant is entitled to further hearing in order that the facts may be fully developed. I apprehend, however, that a finding of undue prejudice to Los Angeles shippers for this reason would warrant no more than an order to cease and desist from the ascertained discrimination, which would leave to defendants the choice of discontinuing the charge at Los

> Angeles or imposing it at competing points found to be unduly favored. That Los Angeles shippers are at a disadvantage because of this charge in competition with interior or eastern shippers has certainly not been shown and could not be seriously contended."

In *Detroit, G. H. & M. Ry. Co.* v. *Interstate Commerce Commission,* 74 Fed., 803, 840, it was pertinently stated by the Circuit Court of Appeals:

> "Here was an arbitrary and peremptory order to abandon the accessorial cartage at Grand Rapids, without regard to any rates, or without option as to readjustment of them, the defendant company not even being allowed the alternative of establishing a like service at Ionia."

But the orders of the Commission were simply based upon the assumption that any rate for carriage to and from Los Angeles or San Francisco found in the tariffs, necessarily, as a matter of law, included a delivery or receipt of freight not only at the stations and public team tracks of the carrier, but at all private industries located upon tracks within the switching limits of the city. But there can be no legal objection so far as any requirement or prohibition of the Interstate Commerce Law may be concerned in a railway company establishing rates of carriage to and from a general central depot in any city and imposing an additional and separate charge where goods are received or delivered at some substation. But here we have a case in which a car which had been hauled over the line with other cars in a train is taken therefrom and receives a separate and special service of switching to a private industry. To hold that this special

switching service may not be treated separately and a separate charge imposed is to hold that by some inference or conjecture there is something in the Interstate Commerce Law which requires a railway company in establishing its rates to and from any given city to necessarily include in the rate compensation for receiving and delivering carload freight in every part of such city upon any of the tracks which it may have the right to use for any such purpose.

V.

THE COMMISSION ERRED AND WAS EVIDENTLY MISLED AS TO THE LAW BY ITS GENERAL INQUIRY AS TO THE SUPPOSED PRACTICE OF RAILWAY COMPANIES IN GENERAL MAKING FREE DELIVERIES AT PRIVATE INDUSTRIES AS THE SAME WOULD NOT DISCLOSE THE LEGAL DUTIES OF THE CARRIERS COMPLAINED AGAINST UNDER THE INTERSTATE COMMERCE LAW, AND THE COMMISSION WAS CONFINED IN ITS INVESTIGATION AND DECISION TO ASCERTAINING AND DETERMINING WHETHER THESE PARTICULAR RAILWAY COMPANIES, IN MAKING THE CHARGE COMPLAINED OF, WERE DOING OR OMITTING TO DO SOMETHING IN CONTRAVENTION OF SOME PROVISION OF THE INTERSTATE COMMERCE LAW.

The Commission seems to have gone far afield in order to ascertain the legal duty of the railway companies here involved by asking defendants' traffic men upon the stand whether there was not some practice or custom of railway companies generally to waive, absorb or not impose a separate charge for making deliveries at private industries located

upon spur tracks in various cities, and that for the purpose of ascertaining what was the rule of the American law as distinguished from the English. That was not a safe source of information as to the law. The railway companies, however, were not called upon in this case to show what the alleged practice or custom elsewhere was, or to show variations therefrom, or upon what considerations the same was founded. The information of their traffic men would probably be confined to their own lines and then might not be altogether accurate. No doubt, however, at a great many places railway companies through stress of competition or for the purpose of securing traffic of favored shippers, or for other special reasons, might deem it necessary or proper to make no separate charge for receipt at or delivery of freight to industries located upon spur tracks, and thereby may in fact, as shown by certain tariffs, extend the freight rate to all such industries to the same extent as to the place where public receipt and delivery is made. All that the alleged practice proves is that in some given cases a railway company has waived its right to make an additional and separate charge for such special service because no charge therefor was stated in the tariff. That, however, does not show that the particular charge is inherently unlawful, nor does it create a legal obligation to do the same thing at all other places unless it is shown that there would be a resultant violation of the third section of the Interstate Commerce Law, in which event the charge could not be condemned altogether, but the order would have to be in the alternative so as to permit

the carrier to obviate the unlawful preference in its own way.

The alleged custom would not alter the legal rights of a railway company except under contracts actually made while the practice was in force in the particular locality involved and was being observed and where the practice was not inconsistent with the contract or legal requirements.

It would no doubt be found, in a case where the inquiry was proper, that, as in the Express Cases, 117 U. S., 1, the supposed practice or custom had its origin in contracts; and it would no doubt be found that where spur tracks were constructed to private industries and freight was received at and delivered to the same, it was by virtue of some contract or definite arrangement between the railway company and the particular shipper. But no valid custom can have it origin in contracts. That alone destroys any claim of custom.

The terms "custom" and "usage" seem to be confounded and inappropriately used by the Commission in its opinion. A custom which has the binding effect of law in the absence of agreement is one which must have existed from a time "whence the memory of man runneth not to the contrary." It must have the force of law independent of persons consenting to it. It is a local common law.

I Chitty's Blackstone, star pages 74 to 80.

Ocean Beach Association et al. v. *Brinley,* 34 N. J. Eq., 438, 448.

Robinson v. *Mollett,* L. R. 7 Eng. & Ir. App., 802.

Hammerton v. *Honey,* 24 W. R., 603.

Hursh v. *North,* 40 Pa. St., 241, 243.

Custom and usage, in the way of practice, is generally shown in particular trades to show the understanding of parties to contracts where the practice or usage is not in contravention of agreement and is, therefore, supposed to be incorporated in the contract by assent of the parties. It then becomes a part of the contract where there is no stipulation or understanding to the contrary. In the case at bar it could not become a part of the contract as it would be contrary to a tariff provision as the tariff provision has the effect of law and must be observed by the parties.

In *Tilley* v. *County of Cook*, 103 U. S., 155, it is said on p. 162:

> "Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. The inference from these principles is inevitable, that, unless some contract is shown, evidence of usage or custom is immaterial."

In *Ulmer* v. *Farnsworth*, 80 Maine, 500 (15 Atl., 65), it is said:

> "But usage or custom cannot be received to establish a liability, or to prove the origin of the relation by which the parties became responsible to each other. Such a usage may have an application to a contract previously existing, but cannot of itself create one."

See, also:

Eager v. *Atlas Insurance Co.*, 14 Pick., 141.
National Bank v. *Burkhardt*, 100 U. S., 692.

Thompson v. *Riggs*, 5 Wall., 663.
Albright v. *Cortright*, 64 N. J., 330; 45 Atl., 634.
G. C. & S. F. Ry. Co. v. *Miami Steamship Co.*, 30 C. C. A., 142, 155.

In addition to this it may be said that the *local custom* or usage in Los Angeles and San Francisco was to make such a charge for such service. But it may be added that no usage or custom could be shown to control the rights of the parties which would conflict with the law or require one of the parties to do something prohibited by that law as to require or permit a carrier to forego a charge for a special service which was made and provided for in its tariffs.

As stated heretofore, the alleged practice, where it prevails, of making free deliveries to private industries was necessarily the result of private arrangement between the particular shipper or owner of the private industry and the railway company. Such free deliveries were no doubt made in order to secure the trade of large customers, and quite likely considered in making or adjusting rates to the particular city. It was in the nature of a concession or privilege to secure such trade. It was a concession which one railway company gave to a favored shipper because another railway company was doing likewise in the struggle for business. It is a species of favoritism which seems to have survived to a large extent in some localities even after the passage of the Elkins and Hepburn laws.

No doubt it could be easily shown quite often or

in a number of instances that in the fierce struggle for business railway companies waived or absorbed charges for many services for which they might lawfully have exacted additional compensation and that to secure the business of large shippers they frequently granted them favors or concessions either openly or secretly. That was what induced complaints of the many smaller shippers not so favored and which led to the adoption of the Interstate Commerce Law and then, owing to its violation as shown at times even in favor of these shippers, finally to the more rigid and drastic provisions of the Hepburn Law. A reference to the old practice is obviously a poor criterion by which to judge of the legal rights of the respective parties.

Such practice, however, imposes no obligation for its continuance so far as any provision of the Interstate Commerce Law may be concerned. Indeed the spirit of that law would seem to require that this species of favoritism might well be discontinued or qualified by the imposition of an adequate and reasonable charge for the special service rendered.

In the case of *Providence Coal Co.* v. *Providence & Worcester R. R. Co.*, 1 I. C. C. Rep., 368, it was contended that because a railroad company had for many years paid the charge of hauling freight from nearby wharves to its station the practice had become a custom which the railroads were obliged to continue. On that point Chairman Cooley said:

> "Complainant insists that the defendant should pay the cost of hauling the coal from the wharf to defendants' freight station in Provi-

dence. But we do not think this can be required. It seems that defendant did this formerly but without any contract obligation to that effect; and, probably, only by way of encouraging complainant in building up a considerable trade. But what it did for a time as a favor or by way of encouragement it might discontinue at pleasure. There could be nothing in the nature of a binding usage about it."

See, also:

Texarkana & Ft. Worth Ry. Co. v. *Sabine Tram Co.*, 129 S. W., 198.

Any inquiry or finding by the Commission as to a supposed custom or usage at other places in the United States which would not result in an undue preference given by these particular carriers complained of at such places to the unreasonable disadvantage of Los Angeles or San Francisco would be beyond the powers of the Commission because not involving a violation of the Interstate Commerce Law.

The investigation of the Commission was based upon a complaint under Section 13 of the law permitting such complaint to be filed complaining "of *anything done or omitted to be done* by any common carrier subject to the provisions of this Act, *in contravention of the provisions thereof.*"

Now what provision of the Interstate Commerce Law was being violated? Beyond the specific requirements and prohibitions of that Act the carriers are at liberty "to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and gener-

ally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

Interstate Commerce Commission v. *C. G. W. Ry. Co.*, 209 U. S., 119.

Southern Pacific Co. v. *Interstate Commerce Commission*, 200 U. S., 554.

This case does not and did not involve any question as to the reasonableness of any regulation or practice of the carrier in respect to its transportation affecting its rates, such as classifications of freight, etc. There was simply involved the legality or right of the carrier in making and separately stating in its tariff a charge for a special service, in addition to freight rates therein, applicable to or from a given city. The alleged custom of railroads in other parts of the country, referred to in the Commission's report, in respect to absorbing in the freight rate any charges for such service, or rather, in respect to performing such service free of charge, was referred to by the Commission merely for the purpose of ascertaining what was supposed to be the rule of law in this country upon the question involved. The exercise of the legal right to make a separate charge for such special service cannot be denounced as an unreasonable practice for it is strictly in accordance with the law. It is no more a practice than is the making and imposing in tariffs of any other charge for any other service.

There was no violation made out or shown from the facts in the report of the Commission of Sections 1, 2 or 3 of the Interstate Commerce Law and

these were the only sections claimed by the complainants before the Commission to have been violated.

It is obvious, however, from the majority report of the Commission that its decision was based upon what the Commission conceived to be some general rule of American law with reference to transportation rates or charges and the effect of the same and at the same time it misconceived and misapplied the provisions of Section 6 of the Interstate Commerce Law. Whether its order was based upon some conception or misconception of the general law, or upon a misconstruction and misapplication of the Interstate Commerce Law, such order would be invalid as made without requisite authority. It should, therefore, be set aside. For reasons heretofore stated, the interlocutory decree and order of the Commerce Court should be affirmed with appropriate directions either to set aside the order of the Commission as invalid upon the face of its report, or to proceed with the final hearing.

These cases were originally instituted in the Circuit Court of the United States for the District of Kansas. The order of the Commission was made upon the complaint or petition of Associated Jobbers of Los Angeles, in the one case (No. 98, Rec., 14), and of Pacific Coast Jobbers & Manufacturers Association, in the other case (No. 97, Rec., 13). No residence was stated. The order does not relate to transportation but simply involves the validity of a charge found in the tariffs of certain carriers filed with the Commission, and as one

of the petitioners in court, The Atchison, Topeka & Santa Fe Railway Company, has its principal office in Kansas as alleged in these bills, the matter covered by the order of the Commission is deemed to arise in that District and, therefore, these cases should be remanded to the District Court of the United States for the District of Kansas, which is the successor of the Circuit Court in which the suits were originally instituted.

Respectfully submitted.

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THE LOS ANGELES SWITCHING CASE.[1]

APPEAL FROM THE COMMERCE COURT.

No. 97. Argued January 14, 15, 1914.—Decided June 8, 1914.

An order of the Interstate Commerce Commission requiring railway companies to desist from exacting charges for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within the switching limits of a terminal city when such carload freight is moving in interstate commerce incidentally to a system line haul is not open to the objection that it rests upon a construction of the Act to Regulate Commerce which would forbid a carrier from separating its terminal and haulage charges on the same shipment.

Quære, and not involved in this decision, whether the rate which the Act to Regulate Commerce requires to be published is a complete rate including not only the charge for hauling but also the charge for the use of terminals at both ends of the line.

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[1] Docket title of this case is Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants, *v.* Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company.

The delivery and receipt of goods on an industrial spur-track within the switching limits in a city is not necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to and from that city when that rate embraces a receiving and delivery service for which the spur-track service is a substitute.

Industrial spur-tracks established within the carrier's switching limits, within which the team tracks are also located, may constitute an essential part of the carrier's terminal system; and whether or not delivery on the spur-track is an additional service on which to base a charge or merely a substituted service, which is substantially a like service to that included in the line-haul rate and not received, is a question of fact for the Interstate Commerce Commission to determine.

Findings of the Interstate Commerce Commission as to the character and use of industrial spur-tracks within the switching limits of a city are conclusions of fact and not subject to review.

Although the Interstate Commerce Commission may not have found that a switching charge if legal was unreasonable in amount or that the shippers had objected thereto, as the service must be performed according to the law of the land, the shippers are not estopped from bringing the matter before the Commission to the end that the carrier's charges should not be unjustly discriminatory.

It is permissible for a railway company to establish a terminal district; and it is for the Commission to determine according to the actual conditions of operation, whether an extra charge for spur-track delivery within that district, regardless of the variations in distance, is either unreasonable or discriminatory.

This court cannot substitute its judgment for that of the Interstate Commerce Commission upon matters of fact within the province of the Commission.

The order of the Interstate Commerce Commission that the carriers desist from making a switching charge for carload freight moving in interstate commerce to industrial spur-tracks within the switching limits of Los Angeles, California, *sustained*.

Pursuant to the act of October 22, 1913, c. 32, judgments of the Commerce Court reversed by this court are remanded to the District Court of the United States for the district where the case would have been brought had the Commerce Court not been established.

188 Fed. Rep. 229, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission in regard to switching

charges within the yard limits of Los Angeles, California, are stated in the opinion.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States, Intervenor:

The action of the Commerce Court in refusing to sustain the motions of the United States to dismiss the bills, and in holding, on the face of the bills alone, that the court had the power to decide, notwithstanding the findings of the Commission based on the evidence, that the service of making deliveries on the spur tracks was different from the service of making deliveries on the team tracks, with a consequent difference in the cost, was so flagrantly erroneous as to require a reversal of the judgments and the dismissal of the bills.

The question as to what are and what are not terminal facilities is manifestly a question of fact to be determined according to the circumstances of each particular case. The findings made by the Commission, after a careful review of all of the attending facts and circumstances, that the spur tracks in question are a part of the carriers terminal facilities, to the same extent as the stations, team tracks, and freight sheds, are conclusive upon the courts.

The findings of the Commission are not only in accord with the facts before it, but they are also in accord with the express provisions of the Act to Regulate Commerce, as well as with certain well considered judicial decisions,—all of which the Commerce Court ignored. See § 7 of the act approved June 18, 1910, 36 Stat. 539, 544, 545, which reënacted, in its original form, § 1 of the act of June 29, 1906, 34 Stat. 584; *Vincent* v. *Chicago & Alton R. R. Co.*, 49 Illinois, 33, 41; *Chicago & North West. Ry. Co.* v. *The People*, 56 Illinois, 365, 382; *Coe & Milsom* v. *Louis. & Nash. R. R. Co.*, 3 Fed. Rep. 775, 778; *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 135.

The case at bar is not that of a carrier making delivery "to a point off its line" by means of a terminal company, for which it is entitled to make an extra charge, as in *Int. Com. Comm.* v. *Stickney*, 215 U. S. 98.

The present controversy is limited to the single question of the right of the appellees to make an extra charge for deliveries made on spurs which constitute a part of their terminals, tracks, facilities, and equipment. The carriers established, and for many years maintained, the practice of making deliveries on the spurs as a part of their terminals and facilities. The shippers have, at all times, acquiesced in that practice. On complaint duly filed, and after a full hearing, the Commission dealt with the practice in all of its aspects. Its order, in pursuance of its investigation, is a mere regulation. The terminal facilities of carriers, with these spurs as a part, have time and again been the subject of consideration by Congress. Against the judgment of the carriers, the shippers, the Commission, the Congress, and the courts, the Commerce Court, with its holding, stands alone.

It is manifest, from its report, that the Commission considered all of the facts and circumstances. No claim to the contrary is made. The Commission also considered the difference between the American and English systems of dealing with terminal services and charges. The findings of the Commission are also supported by facts of such common observation as to be within the scope of judicial knowledge. Without the use of the spurs as terminal facilities, all of the enormous carload tonnage into or out of Greater New York must be handled on a common team track, or in a common depot. The same situation would obtain at Chicago, Pittsburgh, and all other large terminals. The livestock, ore, coal, oil, lumber, grain, and all other carload freight, would be unloaded on a common team track, or in a common depot, and crudely handled by the consignees through the streets of the cities. That

the Commerce Court substituted its judgment, on these facts and circumstances, for that of the Commission, is beyond question. A comparison of the language used by the Commission with that of the court conclusively demonstrates it.

The Commerce Court reviewed the element of the so-called water competition, and substituted its judgment that the industrial track service is not the same as the team track or depot service, for the contrary judgment of the Commission. In doing so, the Commerce Court assumed an authority which this court, for the past ten years, has persistently condemned in every decision relating to the respective functions of the Commission and the courts.

The Commission found that these spurs and sidetracks were a part of the terminal facilities; that deliveries thereon were the same, in cost and character, as the deliveries on the public team tracks; that the line haul rates for all other shippers embraced, without additional charge, deliveries on the terminals; and that out of 10,000 cities in the United States where terminal services are performed, only in the cities of San Francisco, Los Angeles, and San Diego, was this spur track charge imposed. Having made these findings, the conclusion of the Commission that the extra charge was unlawful followed as a matter of course.

No justification is given for the extra charge of $2.50 for spur track delivery. The appellees are practically the only carriers who may compete for the freight, and it is easy for them to agree. When competition is inimical to their interests, they do not compete. When asked by the Commission why this charge was made at these points, the traffic manager of one of the roads replied, "Because we can get it." Another railroad official who appeared before the Commission explained the non-existence of such a charge at all other points on his line, as well as throughout

the country at large, by saying that the absence of such a charge was "a tribute to competition."

The Commerce Court held that "the ultimate conclusion of the Commission is a mixed question of law and fact which certainly ought not to be conclusive upon this court." But this court has held that even on a mixed question of law and fact the findings of the Commission are conclusive. *Ill. Cent. R. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441, 455, 459.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Fred H. Wood and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap*, *Mr. T. J. Norton*, *Mr. C. W. Durbrow*, *Mr. W. F. Herrin* and *Mr. J. P. Blair* were on the brief, for appellees.

There was no abuse of power in issuing injunction *pendente lite*.

The switching charge is not embraced in regular rate. It covers a special service rendered under special contract and separate charge therefor is legal.

There is no dispute as to meaning of tariffs.

The charge is imposed for special service not rendered to public in general and properly stated separately and in addition to freight rate.

The charge is separately stated in pursuance of § 6 of the Interstate Commerce Law.

There are other instances in which a separate charge has been imposed in addition to usual rate.

It is not obligatory upon a railway company to construct industrial spurs and deliver and receive freight thereon. Any obligation is wholly contractual and a separate charge for such service is proper.

The Government's cases are not in point.

The charge is not violative of § 2 of the act concerning unjust discriminations.

The charge was not found to be violative of § 3 of the act concerning undue preferences.

It is error to consider the supposed practice of railway companies, in general, making free deliveries at private industries, as they would not disclose the legal duties of carriers complained against under the Interstate Commerce Law, and the Commission was confined to ascertaining and determining whether these particular railway companies in making the charge complained of were doing or omitting to do something in contravention of some provision of that law.

It conclusively appears from the form of the order and the face of the Commission's report that the order is not based upon any finding of discrimination under either the second or third sections, but upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment.

The Commission's construction of the law is erroneous.

By the plain intendment of the language used, carriers performing a road service between termini may separately state the charges for carriage between places named in the tariffs and their own terminal services performed at the places between which such transportation is conducted.

The Commission's construction is contrary to the purposes and scope of the statute as shown by its legislative history.

The Commission's construction is contrary to the construction of the English act at the time of the passage of the Act to Regulate Commerce.

In the construction of this statute no assumed custom of embracing within a single charge compensation for these two services can weigh against the plain reading of the statute and the contemporaneous construction of similar provisions in the English law.

In so far as the order is predicated upon any assumption that the cost of team track delivery and industry track

delivery is the same, it is based upon an assumption warranted by no finding of the Commission, contrary to the undisputed evidence before the Commission, and contrary to the specific allegation of the petition, admitted by the motions of appellants, that the cost of industry track delivery is greater than the cost of team track delivery.

Waiving the form of the order, the tariffs of the carriers in imposing a terminal charge for industry track delivery when made in connection with a line haul by the carrier making such delivery, while making no terminal charge for team track delivery incident to a line haul, violated no provision of the Act to Regulate Commerce.

The two services in question are not like services performed under similar circumstances and conditions; and the resultant difference in charges results in no undue preference, but is justified both by the dissimilar circumstances and conditions under which rendered, and by the added value of the service in connection with industry track delivery, for which it is just to make an additional charge.

In support of these contentions, see *Central Stock Yards Co.* v. *Louis. & Nash. R. R.*, 192 U. S. 568; *Chalk* v. *Charlotte &c. R. Co.*, 85 N. Car. 371; *Evershed* v. *London &c. R. Co.*, 2 Q. B. D. 254; *Fenner* v. *Buffalo &c. R. Co.*, 44 N. Y. 505; *Francis* v. *Dubuque &c. R. Co.*, 25 Iowa, 60; *Hall* v. *London & Brighton Ry. Co.*, 15 Q. B. D. 505; *Imperial Wheel Co.* v. *St. L., I. M. & S. Ry.*, 20 I. C. C. 56; *Import Rate Case*, 162 U. S. 197, 219; *In re Investigation of Coal Rates*, 22 I. C. C. 604; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 225 U. S. 326; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 145 U. S. 284; *Int. Com. Comm.* v. *Chicago G. West. Ry. Co.*, 209 U. S. 108; *Int. Com. Comm.* v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88, 100; *Int. Com. Comm.* v. *Stickney*, 215 U. S. 98; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *New Orleans &c. R. Co.* v. *Tyson*, 46 Mis-

sissippi, 729; *Party Rate Case*, 145 U. S. 284; *Ralston Townsite Co.* v. *M. P. Ry.*, 22 I. C. C. 354; *South &c. Ala. R. Co.* v. *Wood*, 66 Alabama, 167; *State* v. *Republican Valley R. Co.*, 17 Nebraska, 647; *Tex. & Pac. R. R. Co.* v. *Int. Com. Comm.*, 162 U. S. 197, 219; *Witbeck* v. *Holland*, 45 N. Y. 13; *Winters Paint Co.* v. *C., M. & St. P. Ry.*, 16 I. C. C. 587; *Union Pacific R. R. Co.* v. *United States*, 117 U. S. 355; *United States* v. *Balt. & Ohio R. R. Co.*, 231 U. S. 274.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Atchison, Topeka and Santa Fe Railway Company, the Southern Pacific Company and the San Pedro, Los Angeles and Salt Lake Railroad Company, brought this suit against the Interstate Commerce Commission in the Circuit Court of the United States for the District of Kansas, first division, to restrain the enforcement of an order of the Commission made in April, 1910. The order required these companies to desist 'from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits' in Los Angeles, California, when such carload freight 'is moving in interstate commerce incidentally to a system-line haul.' It also prohibited the exaction of any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight in such cases.[1]

[1] The order is as follows:

"This case being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering

After answer had been filed by the Commission, the suit was transferred to the Commerce Court, and the United States, the Associated Jobbers of Los Angeles and the Pacific Coast Jobbers' and Manufacturers' Association, intervened. The United States thereupon moved to dismiss the bill for want of equity and the petitioners asked for a preliminary injunction. The Commerce Court, denying the Government's motion, suspended the Commission's order until the further order of the court (188 Fed. Rep. 229, 929); and this appeal is prosecuted.

The complaint of the petitioners in substance is that they have established in the city of Los Angeles their public terminals, including what are known as team tracks and freight sheds, for the accommodation of the public in receiving and delivering carload freight; that these facilities are entirely adequate for the purpose, and are

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and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

sufficient to handle all the carload freight shipped or delivered in the city, including that now received or delivered upon the industrial spur tracks in question; that the spur-track service has been established simply for the convenience of the shippers thus served; that it is a service essentially distinct from the line haul, and additional thereto, being of great benefit in the saving of cartage charges to the favored shippers for whose use the spur tracks were constructed; that the industries or plants located upon the spurs are distant from the main tracks, in the case of the Atchison Company from 1-5 mile to 3½ miles, in that of the Southern Pacific Company from 200 feet to 7 miles, and in that of the San Pedro Company from 1-5 mile to 4 miles, and that the special switching service involves a much greater expense than if the carload freight were received or delivered on the team tracks or at the freight sheds of the carriers respectively; that the charge of $2.50 per car for this service is entirely reasonable and one which the carriers are entitled to make in addition to the line-haul rate; and that as such it has been duly specified in their published tariffs. It is also averred that, while in the contracts governing the construction and maintenance of the spur tracks no specific sum was prescribed for the service of receiving and delivering carload freight thereon, the charge above mentioned had been generally established; that at the time of the making of these contracts the shippers understood and willingly consented that, if the railway company performed this special service, there should be additional compensation and that such charge has generally been maintained and collected. The adequacy of the public terminal facilities for carload freight in Los Angeles (consisting of the team tracks and freight sheds of the carriers respectively), the facts set forth with respect to the construction of the spur tracks, their location, the acquiescence in the switching charge and its maintenance, were established before the Com-

mission, it is alleged, by undisputed evidence. It is further stated that on account of water and other competition, the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that the companies do not receive the amount to which they are justly entitled and that they ought not to be required to perform the service in question without reasonable reward. The Commission's order was assailed as beyond its authority, involving a discrimination in favor of the owners of plants located upon the spur tracks and a deprivation of the property of the carriers without due process of law.

The report of the Commission (18 I. C. C. 310) was made a part of the bill. It appears that the proceeding before the Commission was instituted by the Associated Jobbers of Los Angeles and was directed against two distinct practices, involving the spur-track switching charges incident to a system-line haul and to a foreign-line haul respectively. The propriety of such a charge when the line haul was by a foreign carrier was sustained, and the prohibitory order was confined to cases where the charge was made in connection with a system-line haul. The pertinent facts as found by the Commission are substantially as follows:

Each of the carriers has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over the freight rate named in the tariffs, while at industry spurs an additional

charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood. These spurs have been constructed under substantially uniform contracts.[1] None of the industries at Los Angeles fur-

[1] The standard form of the Southern Pacific Company provides as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

The Sante Fe contract contains this provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second

nishes its own motive power, and interline switching is done from the interchange track to the industry by the locomotives of the delivering line, the carrier performing the switching service.

The Commission found that these spur tracks were portions of the terminal facilities of the carriers with whose lines they connected, being distinguished from mere plant facilities such as were under consideration in *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558, and in the cases of the *General Electric Company* and *Solvay Process Company*, 14 I. C. C. 237, 246. Each of the spurs here considered, said the Commission, is in a real sense a railroad terminal at which the carrier receives and delivers freight. It further appears from the report that the charge for spur-track delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city; that it was first imposed by the Southern Pacific and as the other lines came in they adopted the policy of the line already there; that as to certain commodities the charge was not imposed until quite recently and at all times until the Hepburn Act went into effect there was great variation in charge as between individual shippers. It is added that there are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points; only in Los Angeles, San Franciso and San Diego is there such a charge for spur-track delivery, though in many of these places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal

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party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

rates, the Southern Pacific, Northern Pacific and Great Northern lines, impose no such charge, and to the east where defendants' lines have their termini in cities competing with Los Angeles, this charge is also unknown.

The Commission thus described the character of the service in question: "Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.

"Again it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. Before the cars are placed the consignees are given notice of the tracks to which they are to be sent, so that there is no confusion, and the switch

engines which place the cars on one track also serve to haul the 'loads' in and 'empties' out at the other tracks. After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done." 18 I. C. C. pp. 317, 318.

1. It is urged that the Commission's order rests upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment, and that this is a fundamental misconception of the law.

We do not think that the order is open to this objection. It is true that the Commission directed attention to the distinction between the American and English methods of stating rates, pointing out that the English practise of fixing separate schedules for 'conveyance' and 'station terminal' rates had not obtained in this country so far as the records of the Commission show. The opinion was expressed that the provisions of the Act to Regulate Commerce were enacted with reference to the American method of rate-making and that the rate which the statute requires to be published is 'a complete rate,' including 'not only the charge for hauling but the charge for the use of

the terminals at both ends of the line.' 18 I. C. C. pp. 315, 316. We need not stop to consider whether this is a correct interpretation of the act, for the question of a segregation of haulage and terminal charges (meaning, by the latter, charges for the use of ordinary terminal stations in receiving and delivering goods) was not before the Commission and its propriety was not necessarily involved in the decision. No such segregation had been attempted by the carriers here. On the contrary, it was undisputed that the line haul carload rate comprehended receipt and delivery on team tracks or at freight sheds.

The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.

2. Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or side-tracks could not, in any circumstances, be regarded as a distinct service for which separate compensation might be demanded. Cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities, were expressly distinguished by the Commission (18 I. C. C. pp. 313, 314); and it is apparent that the ruling of the Commission would not apply in any case where by reason of the location and extent of the spur tracks and the character of the movement the facts were essentially different from those upon which the decision was based. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105.)

3. On the other hand, it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to

or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute. It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which also various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system. It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question 'as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in.' It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

4. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles—that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds—as conclusions of fact. Assuming that they were based upon evidence, they are not open to review. *Balti-*

more & Ohio R. R. Co. v. *Pitcairn Coal Co.*, 215 U. S. 481, 495; *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 251; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547, 548; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Atchison, Topeka & Santa Fe Rwy. Co.* v. *United States*, 232 U. S. 199, 221.

In this view, we find no ground for holding the order of the Commission to be invalid. It is not denied that the complaining shippers and these carriers were heard before the Commission and that evidence disclosing the terminal situation in Los Angeles, and the nature and use of the various tracks within the switching limits, was presented; and it cannot be doubted that the case demanded an appreciation of a variety of details, or minor facts, in order that the ultimate questions of fact could be determined. It is said that it was established by undisputed evidence that the team tracks and freight sheds provided by the carriers were fully adequate for all carload freight. Putting aside the denial by the Commission of this allegation, it is evident that the question was not simply as to such adequacy, but as to the actual use of the various tracks, the services thereon relatively considered, and whether there was really an extra service in the circumstances shown. Again, it is said that the Commission did not find the switching charge in itself, that is, taken separately, to be unreasonable, but the inquiry was whether in view of the conditions of the distribution of the carload freight through a large area there was in fact such a similarity of movement as to negative the basis for a separate charge. It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge, if freight were received and delivered thereon, and that the charge in question had been generally

maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. (See *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482; *Phila., Balt. & Wash. R. R. Co.* v. *Schubert*, 224 U. S. 603, 613, 614.) If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions and from securing its order directing the carriers to stop the objectionable practise.

But it is contended that the finding of the Commission is opposed to the admitted physical facts, and reference is made to the transportation to and from industrial plants located from 1-5 of a mile to 7 miles from the main track of the carrier. We find no such fundamental unsoundness in the Commission's conclusions. It appeared, as already stated, that the carrier had designated certain territory as within its switching or yard limits in Los Angeles extending for 6 or 7 miles and 'including numerous tracks, main lines, branch lines, industry tracks, team tracks, freight-shed tracks and various structures.' It does not appear how many industries were within a short distance or to how many the statement as to the greatest distance above-mentioned applied. The carrier did not fix a charge according to the comparative service in the case of these various industrial plants. It made the same switching charge whether the distance was 200 feet or 7 miles, that is, it dealt with the situation upon an average basis making the same charge for all this switching in a given area which constituted its terminal district. It was the service within these switching limits, that the Commission was considering. Manifestly it was permissible to establish such a district, and taking the team-track and freight-shed service in that area, and the average spur-track service, the Commission reached the conclusion set forth. It is said

that the finding of the Commission as to the comparative cost of the service was not affirmative, but was merely a negative statement to the effect that the Commission was unable to find that the cost of spur-track delivery was more expensive to the carrier. While this form of expression was used at one place in the Commission's report, at another the service in question was described as one which involved 'no greater expense than would team-track delivery' and we cannot but regard this as the Commission's finding upon the evidence. It is then insisted that the contrary of this finding is self-evident, but the facts with respect to the movement of freight in a great terminal district are by no means so simple that the deliberate judgment of the Commission can be regarded as contradicting the obvious.

The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the court. We cannot regard the Act to Regulate Commerce as justifying an increased or extra charge for a substantially similar service and upon the case made it cannot be said that the Commission has overstepped its authority in forbidding the charge in question as one which was unjustly discriminatory.

In our opinion the Commerce Court erred in denying the Government's motion to dismiss and in granting the petitioners' motion for injunction. The order of the Commerce Court is therefore reversed and the cause is remanded to the District Court of the United States for the Southern District of California, southern division, with instructions to dismiss the bill. Act of October 22, 1913, c. 32; Stat. 1913, p. 221.

It is so ordered.

INTERSTATE COMMERCE COMMISSION *v.* SOUTHERN PACIFIC COMPANY.

APPEAL FROM THE COMMERCE COURT.

No. 98. Argued January 14, 15, 1914.—Decided June 8, 1914.

Los Angeles Switching Case, ante, p. 294, followed and applied to similar switching charges made by railway companies in the City of San Francisco.
188 Fed. Rep. 241, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission relative to switching charges within the yard limits of San Francisco, California, are stated in the opinion.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.[1]

Mr. P. J. Farrell for the Interstate Commerce Commission.[1]

Mr. Fred H. Wood and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap*, *Mr. T. J. Norton*, *Mr. C. W. Durbrow*, *Mr. W. F. Herrin* and *Mr. J. P. Blair* were on the brief, for appellees.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

The Pacific Coast Jobbers' and Manufacturers' Association complained before the Interstate Commerce Commission of a switching charge of $2.50 per car maintained by the respondents for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within the carriers' switching limits in San Fran-

[1] For abstracts of arguments in this case see abstracts in preceding case which was argued simultaneously herewith.

cisco. The Commission, finding the facts to be similar to those found in the case of the complaint of the Associated Jobbers of Los Angeles with respect to switching charges in the latter city (18 I. C. C. 310), entered a similar order prohibiting the carriers from continuing the charge. This suit was thereupon brought in the Circuit Court of the United States for the District of Kansas, first division, against the Interstate Commerce Commission to restrain the enforcement of the order. Upon its transfer to the Commerce Court, the United States intervened and moved to dismiss the proceeding. This motion was denied and upon the application of the petitioners an injunction was granted.

The questions presented on the appeal from this order are the same as those which have been considered in the opinion of the court in No. 98, *Los Angeles Switching Case, ante*, p. 294, decided this day, and for the reasons there set forth the order of the Commerce Court is reversed and the cause is remanded to the District Court of the United States for the Northern District of California with instructions to dismiss the bill.

It is so ordered.